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[1] The opinion and judgment entered February 19, 1974, in the district court are printed as Appendices B and C to the Jurisdictional Statement.

[2] The Commission's order of May 3, 1974, discontinuing the proceeding, is printed as Appendix E to the Jurisdictional Statement.

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In the Supreme Court of the United States

Nos. 73-1966 and 73-1971

Aberdeen and Rockfish Railroad Company, et al., appellants

v.

Students Challenging Regulatory Agency Procedures (S.C.R.A.P.), et al.

and

United States, et al.,

v.

Students Challenging Regulatory Agency Procedures (S.C.R.A.P.), et al.

Appeals from the United States District Court for the District of Columbia.

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of one hour is allotted for oral argument.

October 15, 1974

Mr. Justice Powell took no part in the consideration or decision of this order.

Docket Entries

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May 12 Filed complaint.
12 Issued summons and complaint.
12 Issued summons and complaint to involuntary plaintiff.
12 Filed motion for appointment of special process servers; filed memorandum in support of motion.
12 Filed motion and memorandum in support of motion for preliminary injunction.
12 Filed application and memorandum in support to convene a three-judge court.
15 Issued affidavit of service on involuntary plaintiff.
15 Issued affidavit of service on defendant Attorney General and U.S. Attorney.
15 Entered order appointing special process servers.
19 Filed motion for extension of time to respond to plaintiff's motions; memorandum in support of motion.
26 Filed joint motion to dismiss complaint, memorandum in support of motion and in opposition to preliminary injunction, notice.
26 Filed memorandum and notice in opposition to application for three-judge court.

June 1 Filed motion and memorandum in support for temporary restraining order.
1 Filed motion of Environmental Defense Fund, The National Parks and Conservation Assoc. and the Izaak Walton League of America to intervene as plaintiffs, memorandum in support.
2 Filed motion of Aberdeen and Rockfish Railroad Co. et al. to intervene as defendants.
2 Granted motion to intervene of Aberdeen and Rockfish R.R.
2 Granted motion of Environmental Defense Fund, the National Parks and Conservation Association and the Izaak Walton League to intervene.
2 Denied defendants' motion to dismiss.
2 Denied plaintiffs' motion for temporary restraining order.
2 Granted motion for three-judge court.
2 Filed order denying motion to dismiss and motion for temporary restraining order.
6 Filed motion and memorandum in support of Environmental Defense Fund, The National Parks and Conservation Assoc. and the Izaak Walton League of America to intervene as plaintiffs.
6 Filed designation of three-judge panel.
7 Filed motion and memorandum in support for preliminary injunction of Environmental Defense Fund.
7 Filed opposition to motion to dismiss complaint.

June 12 Filed order granting Environmental Defense Fund, the National Parks and Conservation Association, and the Izaak Walton League of America leave to intervene.

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June 12 Filed notice to enjoin enforcement of orders of ICC regarding freight rates to be determined by three-judge court.

13 Filed motion, affidavit and notice for consolidation with C.A. 806-72.

20 Filed amended complaint and memorandum in support.

21 Filed supplemental memorandum in support of motion for preliminary injunction.

21 Filed memorandum in opposition to motion to consolidate.

21 Filed memorandums of Aberdeen and Rockfish R.R. in opposition to motion to consolidate and to motion for preliminary injunction.

23 Hearing begun; concluded; taken under advisement.

27 Filed memorandum of points and authorities in opposition to plaintiffs' motion to dismiss.

July 10 Entered memorandum opinion and order granting plaintiffs' motion for preliminary injunction and denying defendants' motion to dismiss.

10 Filed injunction.

13 Filed motion, memorandum in support, and notice for stay pending appeal.

13 Filed order denying application of intervening railroads and ICC for a stay of judgment pending appeal.

14 Filed defendants' notice of appeal to the U.S. Supreme Court.

18 Filed certificate of mailing of notice of appeal by USA.

Aug. 1 Entered transcript of proceedings.

1 Entered decision from the Supreme Court of U.S. dated July 19, 1972.

3 Filed notice of appeal to Supreme Court by ICC.

8 Filed notice of appeal to Supreme Court by intervenors.

Nov. 7 Filed motion of plaintiff for preliminary injunction and to expedite oral argument, memorandum in support.

9 Entered order allowing plaintiff 10 days to file memorandum on the necessity of having expedited oral argument; continuing hearing set 11/10/72.

13 Filed defendants' opposition to motion for preliminary injunction and for expedited oral argument.

20 Filed plaintiffs' memorandum regarding expedited oral argument.

20 Filed motion and memorandum in support of intervenor plaintiffs for leave to file amended and supplemental complaint.

20 Filed motion of intervening plaintiffs for modification of preliminary injunction and clarification of jurisdiction.

20 Filed motion of plaintiffs for expedited hearing.

24 Filed memorandum of intervening railroads regarding request for expedited hearing.

Dec. 6 Entered order directing that ICC and intervening railroads respond to motion for preliminary injunction and motion for modification of preliminary injunction and that ICC respond

1972

to memorandum concerning expedited oral argument by 12-15-72.

Dec. 15 Filed memorandum and affidavits of intervening railroads respecting relief sought by Scrap and Environmental Defense Fund.

15 Filed defendants' memorandum of points and authorities in opposition to intervening plaintiff's motions to amend complaint.

15 Filed defendants' memorandum of points and authorities in opposition to plaintiff's motions for preliminary injunction and for expedited oral argument.

22 Letter from Supreme Court regarding request to transmit record.

22 Certified copy of order from Supreme Court noting probable jurisdiction.

27 Filed reply memorandum of intervening plaintiffs in re motions to file amended complaint.

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Jan. 9 Filed order denying plaintiff's motion for preliminary injunction.

9 Filed order directing clerk to prepare and certify the record to the Supreme Court.

9 Filed order denying motion of pltf. for preliminary injunction.

12 Record on appeal delivered to Supreme Court.

Feb. 8 Motion of National Association of Secondary Material Industries, Inc., Commercial Metals Co., I. V. Sutphin Co. and Frankel Brothers & Co., Inc. to intervene as pltfs.

15 Motion of defts. U.S.A. and Interstate Commerce Commission for extension of time to respond to motion of Nasmi to intervene; memo.

20 Opposition of pltfs. to motion for extension of time to respond to motion of Nasmi to intervene.

20 Memorandum of Aberdeen and Rockfish Co. in opp. to Nasmi's motion to intervene.

26 Intervenor complaint of National Association of Secondary Material Industries, Inc., Commercial Metals Co., I.V. Sutphin Co., Inc. and Frankel Brothers & Company, Inc.

23 Order Granting motion of National Assoc. of Secondary Material Industries, Inc., Commercial Metals Co., I.V. Sutphin Co. and Frankel Brothers & Co., Inc. to intervene as Pltfs.

May 25 Motion of Institute of Scrap Iron and Steel, Inc. and Julian C. Cohen Salvage Corporation to intervene as pltfs.

30 Motion of pltf. for preliminary injunction.

31 Motion of pltfs. for Temporary Restraining Order.

31 Motion for Temporary Restraining Order heard and taken under advisement.

Jun. 5 Memorandum by defts. in opposition to interlocutory relief.

7 Order temporarily enjoining defts. and defts-intervenors Aberdeen & Rockfish Railroad Co. and all other railroad intervenors and each of them until further order of Court from collecting

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rate increases. This Order shall apply to shipments originating after June 7, 1973 and moving under transit arrangement.

Jun. 11 Certified copy of order from the Supreme Court of the United States staying order of June 7, 1973 of the District Court pending further order of the Court.

22 LETTER from Clerk, of Supreme Court of United States in re opinion, Judgment or mandate; Opinion attached.

26 COPY of Letter from Clerk of Supreme Court of the United States in re denial of application of SCRAP to vacate the stay.

27 ORDER granting motion of the Institute of Scrap Iron and Steel, Inc. and Julian S. Cohen Salvage Corp. to intervene as plaintiffs; directing parties to submit memoranda by 7-13-73.

28 INTERVENOR complaint of Institute of Scrap Iron and Steel, Inc.

Jul. 3 NOTICE of appeal by The Alerdeen and Rockfish Railroad Company to the Supreme Court of the United States.

6 NOTICE of appeal by deft. Interstate Commerce from order of 6-7-73 to the U.S. Supreme Court.

6 NOTICE of appeal by deft. U.S.A. for order of June 7, 1973 to the U.S. Supreme Court.

11 AMENDMENT to the notice of appeal by defts; copies mailed to Michael Boudin, John F. Dienelt, and John F. Banzdolf, III.

13 MEMORANDUM of Institute of Scrap Iron and Steel pursuant to order of court of June 27, 1973.

13 MEMORANDUM of National Association of Secondary Material Industries, Inc. in response to court order of June 27, 1973.

13 MEMORANDUM of pltf. in response to the court order of June 27, 1973.

13 JOINT memorandum of USA and Interstate Commerce Commission in response to court order of June 27, 1973.

13 STATEMENT of Environmental defense Fund respecting motion for leave to file amended and supplemental complaint.

13 MEMORANDUM of Intervening Railroads as to the court of order of June 27, 1973.

13 ANSWER of Intervenor Railroads to the complaint of SCRAP.

13 ANSWER of Intervenor R.R. to the complaint of Environmental defense funds.

13 ANSWER of Intervenor R.R. to the complaint of National Association of Secondary Material Industries; Inc.

13 ANSWER of Intervenor R.R. to the complaint of the Institute of Scrap Iron and Steel Inc.

18 CERTIFIED copy of Judgment from the U.S. Supreme Court that the judgment of the U.S. District Court is hereby reversed with costs and remanded to the U.S. District Court for further proceedings in conformity with the opinion of this court.

25 JOINT Answers of defts. to amended complaint.

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Sep. 4 MOTION of Intervenor-Pltfs. National Association of Secondary Material Industries, Inc. (NASMI), Commercial Metals Co., I.V. Sutphin Co., Inc., and Frankel Brothers & Co. Inc. for summary judgment.

5 JOINT Motion of defts. for an extension of time in which to respond to intervenor-pltfs' motion for summary judgment.

6 MOTION of Intervenor-pltfs' to expedite briefing schdule and hearing on motion for summary judgment.

10 MEMORANDUM of the intervening railroads respecting briefing and hearing schedule.

10 MOTION of pltf. intervenors, Institute of Scrap Iron and Steel, Inc. and Julian C. Cohen Salvage Corp. for summary judgment.

10 STATUS Hearing

14 ORDER denying the motion of Environmental Defense Fund to file an Amended & Supplemental Complaint; further order that the Environmental Defense Fund shall have until Sept. 24, 1973 to file a motion for summary judgment.

21 MOTION of Guy Vander Jagt, Member of Congress, for leave to file brief Amicus Curiae.

24 MOTION of Environmental Defense Fund for summary judgment; statement of material facts.

Oct. 10 MOTION of pltf for summary judgment.

23 JOINT motion of defts for summary judgment.

23 MEMORANDUM of intervening railroads in opposition to motions of pltf and intervening pltfs for summary judgment.

29 LETTER FROM the counsel for defts in re corrected page 12a of memorandum in support of motion for summary judgment; attachment.

Nov. 2 STATEMENT by pltff. intervenors in opposition to joint motion of the United States of America and Interstate Commerce Commission for summary judgment.

7 ORIGINAL Affidavit of Roger F. Scanlan, Consultant Penn Central Transportation Company.

7 ORIGINAL Affidavit of Norman M. Lorentzsen.

13 INTERVENOR-Plaintiff NASMI'S reply to defts' memoranda in opposition to pltfs' motions for summary judgment, and in opposition to defts' motion for summary judgment.

13 MOTION of Intervenor-pltfs. Nasmi, et. al. for leave to submit their motion for summary judgment on the papers filed.

14 LETTER from E. Bruce Butler in re certified record of the proceedings before the Interstate Commerce Commission with attachments.

14 CROSS-Motion for summary judgment heard and taken under advisement.

14 EXHIBITS D & E.

16 SUPPLEMENTAL reply of intervenors NASMI'S.

15 ORDER directing the parties to file certain memoranda by 11-22-73.

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Nov. 20 WITHDRAWAL of appearance of John F. Dienelt as attorney for pltf. intervenor Environmental Defense Fund; enter appearance of Jacqueline M. Warren.

21 STATEMENT by defts. #1 & 2 to the court; appendix A.

23 MEMORANDUM of the Institute of Scrap Iron and Steel, Inc. to Court's order of November 15, 1973; administrative record summary.

26 COMMISSION actions in ex parte No. 281 by deft. #2.

Dec. 19 CERTIFIED copy of order from the Supreme Court of the United States that the Judgment in these causes be, and the same is hereby vacated with costs; and that these causes be remanded to the United States District Court for further consideration in light of Atchison, Topeka and Santa Fe Railway Co. v. Wichita Board of trade, 412 U.S. 800 (1973) and it is further ordered that Aberdeen and Rockfish Railroad Company, et al recover from S.C.R.A.P. One Hundred Dollars ($100) for their costs herein expended.

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Feb. 19 MEMORANDUM Opinion vacating orders of 10/4/72 and 5/2/73.

19 JUDGMENT vacating orders of 10/4/72 and 5/2/73 in ex parte 281; remanding case for further proceedings.

Apr. 19 NOTICE of appeal by Interstate Commerce Commission to the Supreme Court from opinion and judgment of 2/19/74.

19 NOTICE of Cross-appeal to the Supreme Court of the United States by Institute of Scrap Iron and Steel, Inc. Deposit $5.00 by Boggs.

19 NOTICE of cross-appeal to the Supreme Court of the United States by Environmental Defense Fund. Deposit by Hellegers $5.00.

19 APPEARANCE of John F. Hellegers entered as counsel for Environmental Defense Fund.

19 NOTICE of appeal to the Supreme Court of the United States from order of 2/19/74 by the National Association of Secondary Material Industries, Inc. now known as the National Association of Recycling Industries, Inc. Deposit by Merrigan $5.00.

19 NOTICE of appeal to the Supreme Court of the United States from order of 2/19/74 by the Aberdeen and Rockfish Railroad Company and other carriers listed on attached notice. Deposit $5.00 by Horsky.

19 NOTICE of appeal to the Supreme Court of the United States by United States of America from order of 2/19/74. No fee-Govt.

June 14 MOTION by pltf., Environmental Defense Fund to dismiss its cross appeal to the Supreme Court of the United States from the judgment of February 19, 1974.

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June 28 MOTION by Institute of Scrap Iron and Steel, Inc. to dismiss cross appeal and the appeal of the National Association of Secondary Material Industries, Inc.

July 3 ORDER granting motion of the Institute of Scrap Iron and Steele, Inc. and the National Association of Recycling Industries, Inc. to dismiss their cross-appeal.

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INTERSTATE COMMERCE COMMISSION

EX PARTE NO. 281

INCREASED FREIGHT RATES AND CHARGES, 1972
(ENVIRONMENTAL MATTERS)

EX PARTE NO. 281

INCREASED FREIGHT RATES AND CHARGES, 1972
(ENVIRONMENTAL MATTERS)

Decided May 1, 1973

On further proceedings, the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.)* construed and applied, and a final environmental impact statement issued. Upon consideration of the prior report in this proceeding (341 I.C.C. 288), of certain selective increases in rail freight rates and charges on the movements of commodities being transported for the purposes of recycling (which increases were found in the prior report to be just, reasonable, and otherwise lawful), of the draft environmental impact statement dated March 5, 1973, and the comments thereon, and the quantifiable and other effects of such increases upon the quality of our human environment, found:

a. That such selective rail freight rate increases, when considered in the light of historic and prevailing rate relationships, transport patterns, and the infinite variety of technological and other variables discussed in this report, are not likely to have a significant impact upon the movement of the involved traffic by rail.
b. That any probable adverse environmental effects which cannot be avoided, when balanced against other stated public policy purposes, the lack of probability that the proposed rail rate increases will have a material adverse environmental effect, and the environmental benefits to be ensured by the maintenance of an efficient and reliable railroad system, are not significant.
c. That upon a rigorous exploration and objective evaluation of possible alternatives, the proposed action found to have less detrimental effects upon the environment than other reasonable and practicable alternatives.
d. That future generations will be assured of the availability of an efficient railroad system and its inherent environmental advantages, and that there is no potentially significant short-term effect upon the quality of the human environment because the movements of secondary commodities will not be significantly deterred and such traffic will not be diverted from the railroads.
e. That there are likely to be no irreversible and irretrievable commitments of resources.

Appearances as noted in the prior report, and, in addition:
Russell E. Train for the Council on Environmental Quality.
Sheldon Meyers for the United States Environmental Protection Agency.
W. W. Lyons for the United States Department of the Interior.

M.S. Meeker, Leonard A. Salters, and *Arthur F. Sampson* for the General Services Administration of the United States.

Irving M. J. Kaplan, Edward L. Merrigan, and *Peter H. Meyers* for protestants.

FINAL REPORT OF THE COMMISSION ON FURTHER PROCEEDINGS

BY THE COMMISSION:

This report represents, in accordance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, our final statement as to the environmental effects of these increases in the railroad freight rates and charges on movements of commodities being transported for the purposes of recycling found in our prior report and order (341 I.C.C. 288) to be just, reasonable, and otherwise lawful.

BACKGROUND

This investigation into the adequacy of nationwide railroad freight rates and charges was instituted, following the filing of petitions by certain railroads and connecting water and motor carriers, by report and orders of this Commission entered December 21, 1971 (340 I.C.C. 358). It was noted in that report, which also denied petitioners' request for authority to establish an interim surcharge on certain bills for freight charges on less than statutory notice, that the carriers had failed to submit a statement with their petitions regarding the environmental impact of their proposal as contemplated by the NEPA. We directed the petitioners to file and serve an environmental impact statement within 10 days from the date of service of those orders, and they responded on January 3, 1972. Our December report and orders were served on all parties to Ex Parte Nos. 265 and 267, *Increased Freight Rates, 1970 and 1971,* 339 I.C.C. 125 (1971),[1] and on all known consumer and environmental interests. The orders also were published in the Federal Register. As a consequence, all persons interested in the

[1] This included service on Students Challenging Regulatory Agency Procedures (S.C.R.A.P.). One of that group's principal arguments, before this Commission as well as in the U.S. District Court for the District of Columbia (*Students Challenging Regulatory Agency Procedures (S.C.R.A.P.) and Council on Environmental Quality v. United States of America and the Interstate Commerce Commission*, 340 F. Supp. 189 (D.D.C. 1972), referred to later in this report) had been that the increases violated the terms of the NEPA and were, therefore, invalid. S.C.R.A.P. also argued that this Commission should order a refund of moneys paid under these invalid rates, and "suspend consideration of any additional or further requests for freight rate increases by the Nation's railroads, pending a hearing" on S.C.R.A.P.'s contention.

environmental issues have received due notice of our intention to consider such issues and have been accorded every opportunity to participate at all stages of this proceeding.

By order entered February 1, 1972, it was found that approval of the request by the Nation's railroads to impose a 2.5 percent emergency surcharge on all freight shipments beginning February 5, 1972,[2] would appear to have no significant effect either on the movement of traffic by rail or on the quality of the human environment within the meaning of the NEPA. In approving that temporary increase (then conditioned to expire on June 5, 1972), it was further concluded, among other things, that the railroads have a critical need for additional revenue to offset, in part, recently incurred increases in their operating costs.

By order dated March 1, 1972, and served March 6, 1972, a draft environmental impact statement (a copy of which is reproduced as appendix C to the report entered September 27, 1972, *Increased Freight Rates and Charges, 1972*, 341 I.C.C. 288, at 551), was served on all parties to this proceeding and on other governmental agencies [including the Council on Environmental Quality (CEQ), Environmental Protection Agency (EPA), and the Office of Environmental and Urban Systems, Department of Transportation] which might have an interest in that matter. Thereafter, the United States District Court for the District of Columbia enjoined the collection of the 2.5 percent interim surcharge on goods being transported for purposes of recycling after July 15, 1972, because it found that in declining to suspend the temporary surcharge this Commission had failed to give adequate consideration to the environmental amenities.[3] That statement, it bears noting here, recognized that additional evidence would be needed for a more complete assessment of the potential environmental impact of the selective freight rate increases under consideration. In the report of September 27, 1972, *Increased Freight Rates and Charges, 1972*,

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There had earlier been denied, by order entered January 7, 1972, a petition filed December 20, 1971, by S.C.R.A.P., seeking a 2-week extension of time beyond January 20, 1972, for filing protests against the proposed surcharge and an additional 2-week extension of the date (February 5, 1972) on which such surcharge was to become effective.

[3] *S.C.R.A.P. v. United States, supra.* On July 19, 1972, in *Aberdeen R. Co.* v. *S.C.R.A.P.*, 409 U.S. 1207, 93 S. Ct. 1 (1972), Chief Justice Burger, acting as Circuit Justice for the District of Columbia Circuit, denied an application for a stay of the District Court's judgment pending appeal. While expressing grave reservations regarding the decision of the lower court, he concluded that, on balance, the District Court did not abuse its discretion in deciding "that there was danger to the environment outweighing the loss of income and consequent financial threat to the railroads." This matter is now on appeal to the Supreme Court which has heard arguments in the matter.

supra, it was stated that, based on an analysis of the increases proposed within particular commodity groups and of recent general increases in railroad freight rates and charges, our authorizations would not substantially affect the use, consumption, or shipping of secondary materials, and that the increases at the levels authorized would neither actually nor potentially significantly affect the quality of our human environment. It was concluded that a likely result of the overall limitation and the specific holddowns otherwise found to be just and reasonable might be to encourage the movement of recyclable commodities. As the environmental issues had been considered fully, no formal impact statement was thought necessary.

Petitions[4] were filed objecting to the decision not to issue a formal impact statement and seeking reconsideration of the discussion of the environmental impact of increased rail rates and charges on the movements of commodities being transported for the purposes of recycling. By order of November 7, 1972, this proceeding was reopened in order further to evaluate the environmental effects of increased railroad freight rates and charges on the movements of commodities being transported for the purposes of recycling as defined in paragraph (m) to the General Exceptions to the Tariff of Increased Rates and Charges X-281-B.[5]

[4]Petitions were filed individually by S.C.R.A.P., CEQ, EPA, the Institute of Scrap Iron and Steel, Inc., National Association of Secondary Materials Industries, Inc. (NASMI), Northwestern Steel and Wire Company, Copperweld Steel Company, and the Environmental Defense Fund (EDF).

[5]That definition reads as follows:

> Secondary Materials listed below (being transported for purposes of recycling.)
> Recycling for purposes of this tariff shall mean processing of waste, i.e., any product which has been or would ordinarily be discarded as worthless, defective or of no use, and the processing of such commodity transported in order to produce a commodity of the same kind as the commodity transported or to produce a previous state of the commodity transported.

A certification by the consignor must appear on the Bill of Lading as follows:

> "The increases published in Ex Parte 281 do not apply because the involved goods are being transported for purposes of recycling in a movement from _____ to _____."

22 941	Textile Waste garneted or processed.	33 312	Copper matte, speiss of flue dust.
22 973 15	Noils, ramie.	33 322	Lead matte, speiss or flue dust.
22 973 25 thru 22 973 68	Noils (combings or comber waste), cotton. Rovings, jute and istle (ixtle).	33 332	Zinc dross, residues, ashes.
		33 342	Aluminum residues.
		33 398	Miscellaneous Nonferrous metal residues.
32 299 24	Cullet (broken glass).	40 1	Ashes.
33 119	Blast furnance or coke oven products, nec.	40 2	Waste or Scrap.

(footnote continued on next page)

The United States District Court for the District of Columbia by order filed January 9, 1973, declined to enjoin preliminarily the increases we approved on commodities other than those being transported for the purposes of recycling. The court stated that its decision was influenced, in part, by the substantial and irreparable harm to the Nation's railroads that such an injunction might cause.

The draft impact statement dated March 5, 1973, reflected a good faith effort to satisfy fully the requirements of NEPA. It was believed that every reasonable and practicable method of examination that could be accomplished within the time and many other constraints imposed upon this Commission by statute and otherwise, had been exhausted so as to assure concerned citizens that all issues were carefully and thoroughly considered. Yet again, we have scrutinized the record in this proceeding, including the environmental representations which are summarized in appendix D to the prior report herein. The statement of facts in that report, which was based upon a full and fair hearing, has not been challenged. It is hereby incorporated by reference in this report, and we shall repeat only such facts as are necessary for clarity of the discussion below. In addition, all available literature on this subject has been carefully studied. Attached as appendix A hereto is a list of such material. To satisfy ourselves as to the thoroughness of this research, this bibliography was submitted to the railroads and to each of the petitioners named in footnote 4, *supra*, with the understanding that they would notify us as to any other relevant data of which they were aware.[6] In addition, our staff contacted knowledgeable individuals in this subject area in person, by mail, and by telephone in order to assure full compliance with the NEPA requirements.

In the comprehensive draft environmental impact statement, released March 13, 1973, it was concluded that the selective freight

(footnote 5 continued)

The STCC Numbers referred to shall also embrace all articles assigned additional digits listed thereunder.

This exception shall not apply to goods that are being processed solely by reasons of contamination or defect in grade or quality, nor to byproducts having a commercial market.

This exception is published solely in compliance with preliminary injunction issued on July 10, 1972, by the United States District Court for the District of Columbia in Civil Action No. 971-72, *S.C.R.A.P.* versus *United States*.

[6] Responses were received from the railroad respondents, the Institute of Scrap Iron and Steel, Inc., NASMI, S.C.R.A.P., EPA, Copperweld, and EDF. Additional pertinent source materials were presented by each with the exceptions of S.C.R.A.P. and EDF. This additional material has been considered and identified in the "Supplementary Bibliography" in appendix A. Although the response of NASMI to our bibliography was fully considered, we inadvertently omitted any reference to the said response in our draft impact statement.

rate increases approved in this proceeding as to commodities moving for the purposes of recycling would not have a significant adverse impact upon the quality of the human environment. It was found that any environmental costs which may result from that action would be outweighed by the economic benefits derived by the railroads, and the resultant quality of rail service that such benefits would ensure. Interested persons were requested to submit their views concerning the draft impact statement within 30 days of the date of service thereof. Comments have been filed individually by S.C.R.A.P., the Institute of Scrap Iron and Steel, Inc., General Services Administration of the United States, NASMI, Copperweld, United States Department of the Interior, United States Department of Commerce, EPA, and CEQ, and jointly by EDF, National Parks and Conservation Association, and Izaak Walton League of America, and the railroad respondents. These comments have been summarized and are attached as appendix D to this statement.

In general, the Institute, S.C.R.A.P., and Commerce contend that the draft impact statement was written to support our prior conclusions and not to inform the public. EDF, NASMI, and the Institute assert that additional environmental hearings are required, as is the cross-examination of this Commission's staff members that participated in the drafting of the prior impact statement, and that the instant report should be a second draft impact statement to which the parties herein may comment. Certain parties seek our consideration of alternatives such as the deregulation of the transportation of recyclables (GSA), the increasing of rates on primary commodities (EDF et al.), and the deregulation of motor carriage (EDF et al.). S.C.R.A.P., EDF et al., and CEQ request that increases on the rates of recyclables be postponed until the conclusion of our review in Ex Parte No. 270, of the validity of the existing rate structure. Interior and Commerce seek clarification of the issue of elasticity of demand, while EPA avers that basic economics dictate that some decreases in recycling will result because of the proposed increases in freight rates for secondary materials.

In their comments on our draft impact statement, certain parties have referred to specific literature not previously brought to our attention. S.C.R.A.P. suggests that we consider an EPA Report to Congress on Resources Recovery dated February 22, 1973. We are not aware of the existence of such a report and EPA's Office of Federal Activities, after inquiries with EPA's Office of Solid Waste Management, has disavowed the existence of such a report.

NASMI takes the position that the draft impact statement in this proceeding differs from the position taken by the Federal Maritime Commission which, in draft impact statements issued by it, allegedly has stated that transportation rates *may* preclude recycling. It appears, however, that FMC has never found that transportation rates do inhibit recycling, but merely seeks in its draft statements to outline all possible issues in a particular proceeding including the *possible* effects of increased rates on recycling. FMC's approach concerning the relationship between recycling and transportation rates is, therefore, not contradictory to that reached herein. NASMI's further complaint that the draft impact statement overlooked a report issued by the National League of Cities and the United States Conference of Mayors on March 22, 1973, entitled "Cities and the Nation's Disposal Crises" is not well taken. The findings of a report issued over 2 weeks after the draft impact statements were adopted, plainly could not have been incorporated in that statement. The draft environmental impact statement was complete when issued and is not deficient either because it did not embody reports which were not available or because it is said to be in conflict with "non-decisions" by our sister agency, FMC. The report referred to by NASMI was written by urban groups, and the validity of its undocumented conclusions regarding freight rates and recyclables is open to substantial doubt as demonstrated in the instant statement.

EDF et al., refer to a Ph. D. dissertation by James Sawyer entitled *A Regional Analysis of the Automobile Scrap Processing Sector of the Economy* and to a linear programming model, created by Clifford Russell, of steel producing firms which have some choice of processing and can choose between inputs of scrap or virgin material. These theses represent price-sensitivity studies indicating reasons for fluctuations in scrap prices. We believe that such price fluctuations and the elements generating them have been fully recognized in the instant report and that these studies would shed no new light upon this subject.

We offer one further comment before discussing the involved issues. Much of the criticism that has been leveled at us in this area may be described as one dimensional. Those critical of our actions in this proceeding generally advance only environmental issues; to them, nothing more seems to exist. We are not, however, a one-dimensional agency, and the NEPA is not a one-dimensional statute. The NEPA recognizes that existing agencies have other responsibilities and expects such agencies to incorporate environmental

considerations into their present decisionmaking formulas. Throughout this proceeding we have endeavored to consider all significant environmental factors, long range as well as short term, local as well as national, direct as well as indirect, but we have not lost sight of our other responsibilities. Our views continue to be best summed up in the following statement issued by this Commission in December 1970:

> We share the rising public concern with our environment and with the deterioration of our natural surroundings caused by pollution and by the misuse and depletion of our land and natural resources. We do so first as proud citizens of an involved community and secondly, as Commissioners charged by the people of the United States, acting through their President and Congress, with the regulation of this Nation's surface transportation system in the public interest. *Transportation of "Waste" Products for Reuse*, 114 M.C.C. 92, 121.

Our determination to participate fully in the Nation's effort to stem the pollution of its environment and the depletion of its resources was further evidenced in Ex Parte No. 55 (Sub-No. 4), *Implementation of Public Law 91-190, National Environmental Policy Act of 1969 and Related Requirements.* The order announcing the institution of that rulemaking proceeding, entered April 16, 1971 (339 I.C.C. at 511), made it clear that:

> This Commission must and will implement the directives of the NEPA and related pronouncements. We must and will investigate the methods of meeting these statutory directives to create a more meaningful relationship between this Commission's regulatory responsibilities and the Nation's battle to save the environment.

Our environmental procedural rules, closely reflecting the guidelines enunciated by CEQ, as well as the ruling in *Calvert Cliffs' Coordinating Committee* v. *U. S. Atomic Energy Commission*, 449 F. 2d 1109 (D.C. Cir. 1971), decided in the interim, were promulgated by order of January 14, 1972 (340 I.C.C. 431), and became effective shortly thereafter. With this background in mind, we shall turn now to the specific environmental questions here at issue.

PRELIMINARY DISCUSSION

Pollution threatens our existence. We believe that any plan to protect our surroundings must receive the cooperation of Government, industry, and the public. The environment, however, does not exist in a vacuum. It affects and is in turn affected by many

other facets of our lives. To examine and deal with the environment without considering these other factors would be like a doctor examining and treating a patient's heart without regard to the reaction of the remainder of his body. The doctor may cure the heart ailment, but lose the patient. For example, the Department of Interior claims in its poststatement comments that consideration of freight rate data is not appropriate in an impact statement. It believes that we should only assess the effects of the proposed action on the environment. We fear that such an approach to this proceeding would bar an effective evaluation of the full scope of environmental effects as intended by the NEPA.

Some of the parties to this proceeding, in our judgment, have failed to take a practical view of the total problems here involved. Instead, those parties plainly advance their own individual (and, in certain instances, economic) interests. They do not seek to balance interests, but rather to exclude opposing interests. To illustrate, the submitting railroads contend that they should not be required to finance industrial ecological programs through the maintenance of unduly low freight rates; the shipping interests request that their products not be subjected to the proposed rate increases or that those products should be subject to certain holddowns; certain of the environmentalists maintain that rates on secondary materials (which assertedly should move in greater volumes for recycling purposes) ought to be preserved and protected (if not lowered) at all costs; and the governmental interests together with the private environmental sector seek to demonstrate that this Commission should investigate environmental matters and effects more extensively with our own resources. It is such one-dimensional approaches as these that we are knowingly seeking to avoid. The NEPA [42 U.S.C. 4331(b)] itself requires us "to use all *practicable* means, *consistent with other essential considerations of national policy,* *** to the end that the Nation may *** [as here particularly pertinent] enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources."

As Chief Justice Burger stated in *Aberdeen R. Co.* v. *S.C.R.A.P., supra:*

> Our society and its governmental instrumentalities having been less than alert to the needs of our environment for generations, have now taken protective steps. These developments, however praiseworthy, should not lead courts to exercise equitable powers loosely or casually, whenever a claim of 'environmental damage' is asserted. The world must go on and new environmental legislation must be carefully meshed with more traditional patterns of federal regulation. The decisional process *** is one of balancing and it is often a most difficult task.

It is our responsibility to balance fully, and without tipping the scales in favor of any single factor, the costs and benefits of our actions and any reasonable alternatives that may be presented. We trust that this impact statement accords appropriate weight to economic and social considerations in addition to that which might be given environmental matters.

It further should be noted that many persons participating in this proceeding seem to have adopted the position that, if a problem is incapable of a definite or mathematically precise solution, then it can best be solved by a large quantum of detailed evidence and statistics. This position, characterized by some as the "Dwarfing of Soft Variables Syndrome,"[7] is a familiar one: if you can't count it, it doesn't exist. But no absolute or mathematically conclusive method of balancing the environmental, economic, and social values involved in a general rail freight increase proceeding currently exists. Instead, there are present a wide variety of unquantifiable factors which this Commission must bring to bear in such decision-making matters and which under the law, can be brought to bear only by this Commission, because of our expertise in surface transportation recognized by the Congress and the judiciary. We admit, of course, that readily quantifiable factors are easier to process—and hence more likely to be recognized and then reflected in the outcome—than are those that resist quantification. Nevertheless, the result, despite what turns out to be a spurious appearance of accuracy and completeness, is likely to be significantly warped and hence highly suspect. In our attempt, therefore, to analyze the probable results of any action we take in this proceeding upon the quality of our human environment, we have carefully examined the evidence of record, applied our expertise in surface transportation, and utilized to the fullest extent possible all available expertise in the ecological, economic, and social areas.

It is the purpose of the NEPA to have Federal agencies such as this Commission, in cooperation with State and local governments and other public and private organizations, use all practicable means and measures to create and maintain conditions under which man and nature can exist in productive harmony. To this end, section 102 of the NEPA specifically requires that, to the fullest extent possible, we shall—

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality ***, which will insure that presently unquantified

[7] Tribe, Trial by Mathematics, 84 Harv. L. Rev. 329 (1972).

environmental amenities and values may be given appropriate consideration in decision making along with economic and technical consideration;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality, and to the public as provided by section 552 of Title 5, United States Code, and shall accompany the proposal through the existing agency review processes;***

The NEPA section 102 impact statement is intended as a device to assure that Federal agencies investigate and give weight to any significant environment effects caused by action which they take, to require the development of less damaging alternatives, and to assure that those effects are made known to the public before the action is undertaken. The guidelines of the Council on Environmental Quality, reproduced in appendix A to our report in *Implementation—Natl. Environmental Policy Act, 1969, supra*, seek to coordinate the efforts of Government agencies and to allow Federal agencies to assess in detail the potential environmental impact of a considered course of action in order that adverse effects may be avoided, and the environmental quality restored or enhanced, to the fullest extent practicable.

In this spirit, we shall proceed next to an analysis of the five separate criteria embodied in section 102(C) of the NEPA as quoted above. The Council on Environmental Quality in its guidelines and subsequent memoranda states that Federal agencies must consider the probable impact of the proposed action on the environment, including the impact on ecological systems such as wildlife, fish, and marine life. Both primary and secondary significant consequences for the environment should be included in the analysis. We are also

directed to consider any probable adverse environmental effects which cannot be avoided, such as water or air pollution, undesirable land use patterns, damage to life systems, urban congestion, threats to health, or other consequences adverse to the environmental goals set forth in section 101(b) of the NEPA. In addition, all alternatives to major proposed actions must be evaluated even though this may lead to a consideration of effects and options outside this agency's actual control. Cf. *NRDC* v. *Morton*, 458 F. 2d 827 (C.A.D.C. 1972). That court concluded that a full discussion of such alternatives is required in order to reach the decision at hand as well as to inform the public of the issues and to guide the decisions of the President and Congress, but that a detailed discussion is not required of alternatives that are deemed only remote and speculative possibilities. The agency, according to the *Morton* court, need not indulge in "crystal ball inquiry" in assessing the effects of alternatives, but will have taken the "hard look" required by NEPA if it has discussed the reasonably foreseeable effects with a thoroughness commensurate with their severity and the significance of the action.

In accordance with the NEPA we must fully consider the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity. This in essence requires this Commission to assess the proposed action for its cumulative and long-term effects from the perspective that each generation is trustee of the environment for succeeding generations. We are also directed by the NEPA to consider any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented. This requires us to identify the extent to which the considered action curtails the range of beneficial uses of the environment.

It probably would not be possible for us to issue separate environment impact statements for each specific commodity which has been classified as recyclable in this proceeding. Therefore, we have analyzed the overall environmental effects of the proposed rates increases on all recyclables as a class, separately on eight commodity groups of recyclables, and on certain selected and representative commodities individually. We believe that this approach is administratively efficient and practical, and that this Commission has met its expansive obligations pursuant to the NEPA.

POSTSTATEMENT COMMENTS RELATING TO PROCEDURAL AND RELATED MATTERS

It appears that a substantial difference of opinion has developed among the parties as to the procedures that have been followed in this proceeding even though most such parties challenge the completeness, accuracy, and objectivity of the matters set forth in the draft environmental impact statement. Thus, S.C.R.A.P. complains that the burden of proof in this proceeding has been improperly placed upon those parties (other than the railroads) advocating holddowns or other similar action as to rail freight rates or commodities being transported for the purposes of recycling. Other parties, best exemplified by EDF et al., contend that this Commission must develop more adequate, objective, and systematic data in order to justify the proposed freight rate increases as to recyclable materials, and the draft impact statement wrongfully attempts merely to weigh the arguments and evidence advanced by the parties to this proceeding, rather than comprising the independent and searching inquiry and analysis mandated by the NEPA. On the other hand, the Institute avers that this Commission apparently has assumed the position of a proponent in this proceeding in contrast to its proper role as regulator. The Institute objects to the reliance placed in the draft statement upon what it characterizes as extra-record material which has not been tested by cross-examination. S.C.R.A.P. and the Department of Commerce state that they believe the draft impact statement was written to support the prior conclusions of this Commission and not to inform the public. We strongly reject the validity of all of these assertions.

This Commission is required by the NEPA to investigate, evaluate, and report the probable environmental impact of our major proposed action. In *S.C.R.A.P., supra,* this Commission was informed that it may not sit as an arbitrator of the facts, but must develop a sufficient record on which to base its environmental determinations. We have done so in this proceeding. Contrary to S.C.R.A.P.'s contention, the burden of proof in this proceeding has never been placed upon the environmentalists. Certainly, S.C.R.A.P. presented no relevant or probative data upon which an intelligent decision in this matter could possibly be based. Instead, we have attempted to research all available literature and have contacted governmental and private industry environmental experts in order to develop the complete record found herein. We

are not content to sit back and simply weigh the evidence of record because the parties to this proceeding have failed properly to develop the environmental data. Our present conclusion that the proposed action is not likely to significantly affect the quality of the human environment is predicated upon the extensive record developed in this rulemaking proceeding preceding our prior report (341 I.C.C. 288), the expenditure of many man-hours of research and study, and the application of our historical expertise in transportation generally and ratemaking in particular. The parties to this proceeding, which lack both expertise in transportation and supporting research data relating to recycling, aver that the evidence has not been objectively weighed. As can be seen by the discussions later in this statement, the data we have developed were properly considered and logically lead to the conclusions reached herein.

EDF et al., propose what they consider to be a more systematic and objective approach to resolving these issues. They do not, however, explain or even intimate the length of time that such a four-step procedure would consume, nor whether that procedure could have been completed during the statutory time period within which we must act in suspension proceedings. We have examined the railroad rate structure and the effect of the increased rates and charges upon recyclable commodities and that we have done so differently than some of the parties (such as EDF or the academicians they have employed) would have, does not render our effort suspect. In an area as imprecise, ephemeral, and subjective as the effect of rate increases on the use of secondary materials, there are bound to be disagreements about how best to make the requisite environmental assessments. Each method has advantages and disadvantages, and the selection of one in no way denies the appropriateness of another. Thus, no matter how we might have approached our task, a dissatisfied party might have said our evaluation was inadequate, and that another method would have permitted a more meaningful determination. EDF et al., acknowledge that their four-step procedure is "formidable" and in any event would not be productive of "absolute accuracy." That we elected a different course does not render our analysis any the less objective or systematic.

EDF et al., NASMI, and the Institute assert that this statement should be issued as a second draft impact statement, that additional hearings should be scheduled on the environmental issues, and that

our staff members who participated in the preparation of this report should be made available for cross-examination. Oral hearings have been held in this proceeding, and the parties have had an opportunity to present environmental data at oral argument, in petitions for reconsideration, in responses to the bibliography herein, and in commenting upon our draft statement. We see no benefit to be derived by allowing further hearings in this proceeding even if (as we doubt) those hearings could be completed within the statutory suspension period. The procedure is in keeping with the requirements of both the Administrative Procedure Act (5 U.S.C. 553) and the Interstate Commerce Act. The present environmental record has been developed in substantial part by our own independent efforts and there appears no reasonable basis for now concluding that the parties can make any further rational contribution to that record.

This report will be a final report. The suspension period for the involved rates terminates June 7, 1973, and we have no statutory authority unilaterally to extend that deadline. For this reason, we cannot continuously issue draft statements and prolong a final result in this matter. A proceeding must have a termination. It certainly was not the purpose or function of the NEPA to extend proceedings endlessly to the economic benefit of certain of the complaining parties. The record in this proceeding is complete and further public procedures herein would be impracticable, unnecessary, and contrary to the public interest.

In regard to the requests for cross-examination of our staff, the draft impact statement was a part of a report of this Commission and is the subject of administrative and judicial appeals in the same manner as any other report of this Commission.

Asserted Discrimination in the Rate Structure

It is contended that our approval of increased rail rates and charges on commodities moving for recycling purposes will serve to aggrevate discrimination already allegedly in the railroad freight rate structure, to the detriment of recyclable commodities and the national recycling effort. Chairman Russell B. Train of CEQ, for example, has conveyed to us his belief that "several rail haul cost biases currently exist," and certain of the parties herein aver that discriminatory railroad rates and charges impede the movement of waste materials and favor the transportation of primary materials with "obvious" adverse consequences to the environment.

As recently as the last railroad general rate proceeding, we pointed out that such a case does not provide an appropriate vehicle for examining these issues. *Increased Freight Rates, 1970 and 1971*, 339 I.C.C. 125, 189 (1971). Thus, we do not attempt to determine whether the particular rates which result from the increases are maximum reasonable rates, nor does the order constitute a prescription of rates within the meaning of the decision in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370. If individual rates or groups of rates are believed to be unjust and unreasonable, a shipper or other interested persons has an administrative remedy available in sections 13 and 15 of the Interstate Commerce Act, 49 U.S.C. §§13 and 15. General revenue proceedings are inappropriate forums for litigating such issues. *Electronic Industries Assn.* v. *United States*, 310 F. Supp. 1286, 1289 (D. D.C. 1970), affirmed mem., 401 U.S. 967 (1971); *Alabama Power Co.* v. *United States*, 11 F. Supp. 337, 338 (D. D.C. 1069), affirmed by a divided court, 400 U.S. 73 (1970); *Algoma Coke & Coal Co.* v. *United States*, 11 F. Supp. 487 (E.D. Va. 1935).

Moreover, we currently have under way a comprehensive investigation of the railroads' freight rate structure, Ex Parte No. 270, *Investigation of Railroad Freight Rate Structure*. That proceeding was instituted by us in recognition of the growing concern regarding the pricing of railroad services. More particularly, we felt the need for exploring whether, as has been contended, the application by the railroads of the increases in rates and charges as approved by us (especially when measured as percentages of existing rates) have over the years caused a misalignment of rate relationships and a distortion of proper rate levels. A specific area we have assigned for development in that case is the way in which our prior rate decisions may have an effect on the Government's program of protecting the environment. The Institute of Scrap Iron and Steel, Inc., the National Association of Secondary Material Industries, Inc., and other parties to this proceeding are parties as well to Ex Parte No. 270. This Commission has recently named a Special Counsel to further develop the record in Ex Parte No. 270. We also have proposed new rules governing the presentation of evidence in Ex Parte No. 290 which, if later determined appropriate, would provide for data relative to the revenue contribution of 143 major commodities or groups thereof. Notwithstanding these on-going efforts to eliminate any distortions that may inhere in the rate base and to improve our evidentiary

procedures applicable to proceedings such as this one, we think that the following comments are appropriate at this point in our deliberations.

We have made an examination of the presently effective railroad rate structure, and we have done so without ascribing to any of the parties the burden of establishing that it impedes the transportation of recyclable commodities. We recognize full well that the obligation of assessing the ecological implications of our actions, singly taken or in their cumulative effect, is ours.

The contention that the existing railroad rate structure contains a bias in favor of primary materials to the prejudice of secondary materials rests, essentially, upon a surface comparision of their rates. Thus, for example, the Institute of Scrap Iron and Steel, Inc., notes that in 1966 the average rail revenue per 100 pounds was 20.6 cents for iron and steel scrap, whereas, the comparable earnings on iron ore were but 8.2 cents. The Institute acknowledges that by 1969 this disparity was considerably less—$5.11 per gross ton for scrap iron compared to $2.67 for iron ore in the United States and $4.70 against $2.58 in official territory. The charge that the rates on iron and steel scrap are more than twice those of iron ore has been repeated by others as well, and underlies the frequently repeated charge that the rail rate structure maintained by the railroads prefers primary materials to the undue prejudice of secondary materials.

The allegation that the disparity in rates between iron and steel scrap and iron ore demonstrates an unwarranted bias, reflects an unfamiliarity with American transportation and a naivety as to ratemaking in domestic commerce that the Institute's long and sophisticated participation in our proceedings belies. If rates were established on nothing more than a consideration of the weight of the shipment, the Institute's position would have some plausibility. As it well knows, however, that is not and never has been the method followed in this country for establishing transportation charges.

It is true that domestic transportation rates are generally stated in terms of cents per hundredweight. In this respect, their method of publication differs from the practice in the ocean trade, in which rates normally are stated on the basis of displacement or cents per cubic foot. Nevertheless, a comparison of the rates, expressed as cents per hundredweight, does not permit a meaningful determination as to whether a discriminatory or prejudicial situation obtains.

We have said on numerous occasions that the mere existence of a difference in rates does not establish undue prejudice or preference. *Black Hills Glass & Mirror Co.* v. *C., M., & St. P. & P. R. Co.*, 313 I.C.C. 333, 339 (1961); *Malt Liquors, Missouri, Illinois, and Nebraska to Okla.*, 310 I.C.C. 93, 101 (1960); *United States Lime Products Corp.* v. *A., T. & S. F. Ry. Co.*, 288 I.C.C. 293, 300 (1953); *Cinder Concrete Products, Inc.*, v. *Colorado & S. Ry. Co.*, 279 I.C.C. 191, 194 (1950); *A. C. Jensen Block & Supply Co.* v. *C., M., & St. P. & P. R. Co.*, 273 I.C.C. 399, 401 (1948); *Waggener Paint Co.* v. *Chicago G.W. Ry. Co.*, 308 I.C.C. 148, 150 (1959); *Commodity Credit Corp.* v. *Texas & P. Ry. Co.*, 306 I.C.C. 525, 533 (1959); and *State Board of Equalization of Wyo.* v. *Abilene & S. Ry. Co.*, 305 I.C.C. 497, 513 (1959).

Our view long has had the approbation of the courts. Nearly 50 years ago the Supreme Court of the United States in *United States* v. *Illinois Central R.R.*, 263 U.S. 510 (1923), expressed its agreement that differences in rates in and of themselves do not establish their illegality under the antidiscrimination provisions of the Interstate Commerce Act. The Court said, *supra*, 263 U.S. at 524:

*** to bring a difference in rates within the prohibition of §3, it must be shown that the discrimination practiced is unjust when measured by the transportation standard. In other words, the difference in rates cannot be held illegal, unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions.

Accord: *Southern States Cooperative, Inc.*, v. *Baltimore & O. R. Co.*, 323 I.C.C. 400, 408 (1964); *Southeastern Assn. of R. & Util. Commrs.* v. *A., T. & S.F. Ry.*, 321 I.C.C. 519, 553 (1964); *United States* v. *Oklahoma City-Ada-Atoka Ry. Co.*, 319 I.C.C. 182, 186 (1963); and *Seattle Traffic Assn.* v. *Consolidated Freightways, Inc.*, 306 I.C.C. 87, 92 (1959).

We begin by noting that there are literally hundreds of thousands of commodities that comprise the commerce of this Nation, and that the railroads through their network of connecting lines hold themselves out as common carriers of all of such commodities between each of the tens of thousands of points that they serve. To enable them to render their task of rate publication manageable, our Nation's railroads long have classified the freight that they transport. We think it appropriate to include in this discussion of the alleged discrimination in the rate structure a brief summary of the principles of classification and ratemaking. Our review of these fundamentals is offered at this point not to draw comparisons between any specific

commodities, whether they be primary or secondary, but simply to suggest the complexity and diversity of the factors that go into classification and ratemaking.

A classification has a twofold meaning in transportation parlance.[8] In the one sense, the term denotes the process by which the myriad commodities tendered a carrier are grouped for the pricing of its services. As succinctly stated in Van Metre, *Industrial Traffic Management*, 27 (1953):

> It must be immediately apparent that the publication of rates for a railroad system as large as that of the United States is a monumental task. Our railroads handle thousands of commodities each day, between thousands of stations. On each commodity handled there is a published freight rate applying to its transportation between each freight station and all other freight stations in the country. If all articles carried were charged an identical rate per hundred pounds, the tariff for a single station would have to be as large as a good-sized mail-order catalouge. But instead of one article, there are probably as many as 30,000 for which freight rates must be made.[9]

The process by which the publication of transportation charges of the thousands of articles in commerce is made manageable is classification. Classification as so used has been defined by the Supreme Court in *Director General* v. *Viscose Co.*, 254 U.S. 498, 503 (1921), as follows:

> Classification in carrier rate-making practice is grouping,—the associating in a designated list, commodities, which, because of their inherent quality or value, or of the risks involved in shipment, or because of the manner or volume in which they are shipped or loaded, and the like, may justly and conveniently be given similar rates. * * *

The Commission has variously defined the classification of freight as "a ratemaking scheme devised for the purpose of according the same rate to all commodities of a like character from a transportation standpoint," *McCrory Stores Corp.* v. *Director General*,

[8] For comprehensive discussion of this subject, see Colquitt, *The Art and Development of Freight Classification* (1956); and Way, *Elements of Freight Traffic* (1956).

[9] Drinker in *Interstate Commerce Act 193* (1909), observed:

> "Classification," said the Commission in its first Annual Report, "is the foundation of all rate making."
>
> For the railroads to attempt to fix a separate rate for each commodity shipped, would not only be unduly burdensome to them and entirely impractical, but it would lead to an endless complication of tariffs, which would undoubtedly be more objectionable to shippers in general than a simpler system of rates adjusted with less theoretical nicety. On all sides it has been found advisable to sacrifice, to a certain extent, mathematical accuracy, for the sake of securing practical simplicity.

55 I.C.C. 423, 424 (1919); and *Hires Condensed Milk Co.* v. *P. R. R. Co.*, 38 I.C.C. 441, 447 (1916); "a matter of comparison of all the commodities that move as freight and the assignment of ratings such that each shall bear its fair share of the transportation burden," *Classification of Canned Goods*, 98 I.C.C. 166, 176 (1925); and "a determination of reasonable relations between commodities, with groupings of kindred articles." *National Electrical Mfrs. Assn.* v. *Atchison, T. & S. F. Ry. Co.*, 289 I.C.C. 125, 132 (1953).

The factors that influence the freight's classification, the so-called transportation characteristics, are many and varied. In *Motor Carrier Rates in New England*, 47 M.C.C. 657, 660-61 (1948), these characteristics were listed in the following terms:

> The characteristics of the commodities which must be considered in fixing classification ratings are generally as follows:
>
> 1. Shipping weight per cubic foot.
> 2. Liability to damage.
> 3. Liability to damage other commodities with which it is transported.
> 4. Perishability.
> 5. Liability to spontaneous combustion or explosion.
> 6. Susceptibility to theft.
> 7. Value per pound in comparison with other articles.
> 8. Ease or difficulty in loading or unloading.
> 9. Stowability.
> 10. Excessive weight.
> 11. Excessive length.
> 12. Care or attention necessary in loading and transporting.
> 13. Trade conditions.
> 14. Value of service.
> 15. Competition with other commodities transported.

Accord: *All States Frgt.* v. *New York, N. H. & H. R. Co.*, 379 U.S. 343 (1964); *Class Rate Investigation, 1939*, 262 I.C.C. 447, 508 (1945); *Investigation and Suspension Docket 76*, 25 I.C.C. 442, 463, 472-73 (1912); and *Proctor & Gamble Co.* v. *C., H. & D. Ry. Co.*, 9 I.C.C. 440, 482 (1903). It is because of these many and varied characteristics that bare reliance by a number of parties herein upon certain Burden Study statistics (which represent estimates only) to indicate the contribution a particular commodity may be making to the carriers' costs is not well taken. This matter will be amplified at a later point in this statement.

The first of the listed transportatin characteristics is the shipping weight per cubic foot, or density. As we have noted, domestic transportation charges in America generally are assessed on the basis of

the weight of the shipment that is, the rates are stated in terms of so many cents per 100 pounds. Obviously, under such a scheme of pricing, the shipper tendering a large shipment in terms of weight will pay more than the shipper tendering a light shipment. In other words, a shipper of a 1,000-pound box would be expected to pay more than the shipper of a 100-pound box. However, a carrier is limited in how much freight it can carry by the capacity of its equipment, and in any one piece of equipment it can carry a heavier load of freight having a low cubic displacement than it can shipments of high cubic displacement. Therefore, in determining the rate relationships of various commodities, that is, in grouping commodities for the assessment of transportation charges, it is natural that the carrier would rate freight of low density higher than freight of high density, all other things being equal. Feathers should be rated higher than lead, as, indeed, they are. Van Metre in *Industrial Traffic Management* 51-52 (1953), says of this transportation characteristic:

> Since rates are almost all quoted in cents or dollars and cents per hundred pounds or per ton, it is plain that a car loaded to its capacity in pounds earns more than one which is loaded only to a fraction of that capacity. But there are many articles so light in proportion to their bulk that under no circumstances could enough of them be packed into a car to bring its load up to its weight capacity. Therefore it costs the railroad much more per hundred pounds to transport such articles than to transport articles so heavy in proportion to the space they occupy that they can fill a car to the limit of its weight capacity. The light, bulky articles take up the earning space of the carrier's equipment, and the only way in which a carrier can secure revenue which adequately reflects the cost of transporting such articles is to make a high charge per hundred pounds for their transportation.

The significance of density as a transportation characteristic is illustrated by the shipments of bulk cottonseed from Blytheville, Ark., to Memphis, Tenn., and of loose cotton in bags from Arbyrd, Mo. (Paragould, Ark.), to Memphis. Although these shipping points are approximately comparable, the cottonseed takes a rate of 17 cents per hundred pounds for a minimum shipment of 50,000 pounds (St. L. S. W. Ry. tariff 321-C, ICC No. 4853) while the loose cotton in bags takes a rate of $1.83 per hundred pounds (tariff SWL 237-L, ICC No. 4907). This elevenfold difference in rates is explained upon an examination of sample waybills. The cottonseed loads heavily, at over 70,000 pounds per car, resulting in freight revenue of over $120 per car to the carrier. The loose cotton in bags of course loads lightly and, at about 6,000 pounds per car, earns less than $120 per car for the carrier. Since the carrier's costs for moving

the two cars are similar in this specific situation, except for such items as added fuel costs for pulling a heavier car, the difference in rates enables the carrier to realize comparable revenues on the movements.

Another roughly comparable movement of primary and refuse materials is the transportation of cotton linters from Greenville, Miss., to Memphis, Tenn., and the movement of cotton motes from Greenwood, Miss., to Memphis. The linters move at a rate of 32 cents per hundred pounds with a minimum shipment of 60,000 pounds (SFTB 2011-M) while the motes bear a scale of rates:

Minimum weight—pounds	*Rate—cents per hundred pounds*
20,000	60
30,000	42
40,000	39
Excess over 40,000 in same car	32

An examination of sample waybills again revealed that while the motes load at just over 40,000 pounds per car, thus bearing the 39-cent rate, the linters load at over 60,000 pounds per car. The revenue realized by the carrier is higher for the lower rated commodity: the 20-percent difference in rates is more than offset by the 50-percent difference in loading characteristics, as far as the carrier is concerned.

The next group of transportation characteristics—liability to damage, liability to damage to the commodities with which it is transported, perishability, liability to spontaneous combustion and explosion, and susceptibility to theft—relate to the obligation of the railroads as bailees of the goods that they transport.

Whatever may have been the obligation of the railroads under the common law, under the provisions of the Interstate Commerce Act, rail carriers are tantamount to insurers of the safe delivery of cargoes entrusted to their care for transportation. *Loss and Damage Claims*, 340 I.C.C. 515 (1972). Section 20(11) of the Interstate Commerce Act, 49 U.S.C. §20(11), states "That any common carrier, railroad, or transportation company *** shall be liable *** for any loss, damage, or injury *** caused by it [or by its connecting carriers]" to the property transported by it. That being the case, it stands to reason that in establishing the rate relationship between the many commodities they transport, the railroads should assess a higher charge on freight more likely to be lost or damaged in transit than on freight not having such a tendency. Thus, electric light bulbs

should be rated higher than electric switches, as, of course, they are. The Institute in its comments on our draft statement asserts that the railroads refuse to pay freight claims on scrap. It offers no substantiation of this allegation and, subject to the caveats expressed in the *Loss and Damage Claims* case, it has available the same legal remedies as any other shipper to collect for its legitimate claims.

The next transportation characteristic—value is related. If two packages of equal weight are lost in transit, the carrier incurs a greater monetary loss in paying the claim of the shipper of the more valuable freight than it does in paying any that may be submitted on the less valuable freight. Accordingly, in establishing the relationship of rates it would be appropriate for the carriers to assess the former a higher rate than the latter. In other words, as a measure of the risks assumed, value clearly is a transportation characteristic to be taken into account. Moreover, value is a factor in classification for the further reason that it generally is indicative of the ability of a commodity to pay the transportation charges. *Rates on Lumber and Lumber Products*, 52 I.C.C. 598, 615 (1919).

In the latter respect, according the value of the commodity consideration in establishing the relationship of transportation charges is not dissimilar from oridinary commercial practices. It is almost universally true that merchants and manufacturers have a greater markup or assign a greater portion of their overhead and anticipated profit to their expensive items than to those bearing a smaller price. The railroads and other domestic transportation companies long have done no less. As Professor Locklin has noted in his *Economics in Transportation* (6th Edition 1966) p. 418:

> It has been customary from the earliest days of railway development to charge comparatively high rates on valuable articles and lower rates on cheaper articles *** sometimes the valuable commodities will not stand high rates, but the usual relationship clearly warrants the prominence generally given to value comparisons in rate cases. There is no need of giving citations to cases in which the Commission has acknowledged value of the article as a factor to be considered in determining the reasonableness of rates. Their number is legion. In fact, there is scarcely a case involving rates on particular articles which does not make use of value comparisons. In many cases value becomes the controlling consideration.

The next characteristics—case or difficulty in loading or unloading, stowability, excessive weight, excessive length, and care or attention necessary in loading and transporting—can be treated as a group. That they affect the costs incurred in performing the transportation and, accordingly, warrant consideration by the carrier in

establishing the relationship of its transportation charges is so obvious as to require little or no amplification.

As we previously have noted, domestic transportation charges in America are generally stated in terms of so many cents a hundredweight. That being the case, the carrier needs to receive greater compensation for a shipment of freight requiring extraordinary handling than one of equal weight that can be moved in the usual fashion. Thus, for example, a 10,000-pound transformer of a type used at a power company substation, requiring skids, winches, or similar devices for loading or unloading, should take a higher charge per 100 pounds than a shipment of equal total weight of boxed transformers of the type used in installing door chimes in private dwellings. Similarly, it stands to reason that, all things being equal, the carrier should receive more money for handling a 100-pound bar of steel stretched to a 50-foot length than it can collect for a barrel of nails of equal weight. In fact, the railroads and other domestic carriers assess their rates just that way. Referring to these factors, among others, Flood in *Traffic Management* (2d Edition 1963) p. 97, concluded, "Additional services required to transport a specific commodity add to the transportation costs and therefore become important elements in classifying the commodity."

As for the next transportation characteristic—trade conditions—we heretofore have noted that a depressed condition existing in an industry may be a proper factor to be considered in determining the reasonableness of the rates that apply on its products. Thus, in a case involving rates on wool, *In Re Transportation of Wool, Hides, and Pelts*, 23 I.C.C. 151, 156 (1912), it was said, "If the condition of this industry is such that it can not flourish, that the traffic will not move for the reason that the wool itself will not be produced, that, certainly, is a circumstance which may be considered in comparing this rate with those upon other commodities." Again, in *Utah-Idaho Millers and Grain Dealers Asso. v. R. R. Co.*, 44 I.C.C. 714, 726 (1917), it was concluded, "*** the condition of an industry has an influence upon the ability of a commodity produced by that industry to bear a rate, which in turn may have a bearing upon the reasonableness of the rate charged." Accord: *Wool and Mohair Rates*, 276 I.C.C. 259, 269 (1949); *Livestock—Western District Rates*, 190 I.C.C. 611, 633 (1933); and *Rates and Charges on Grain and Grain Products*, 91 I.C.C. 105, 143 (1924).

Professor Locklin in *Economics of Transportation* (6th Edition 1966), p. 427 said:

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The ability of a particular commodity to stand a rate is sometimes affected by the conditions of prosperity or depression within the industry which produces the commodity. If an industry is in a depressed condition, high rates may result in curtailed production. Conversely, if the industry is prosperous, rates may be increased without affecting production. For this reason the Commission has long recognized that the conditions existing in an industry may be taken into consideration in determining the reasonableness of rates. This position has the approval of the United States Supreme Court, for in *Ann Arbor Railroad Co.* v. *United States* the Court said: "In rate making under existing laws it has been recognized that conditions in a particular industry may and should be considered along with other factors in fixing rates for that industry and in determining their reasonableness." The principle received special emphasis in the Hoch-Smith Resolution, passed by Congress in 1925, which declared that the "true policy" to be observed by the Interstate Commerce Commission in adjusting rates was "that the conditions which at any given time prevail in our several industries should be considered in so far as it is legally possible to do so, to the end that commodities may freely move."

The principle that rates should be adjusted in accordance with the economic conditions existing in an industry may easily be abused. It is valid only in so far as it throws light on ability to pay transportation charges. It is not valid when used to help one class of individuals at the expense of another. The Interstate Commerce Commission has emphatically declared that it is not justified in reducing rates on a commodity merely to relieve a distressed industry. This position was taken in a number of cases which came up after World War I, when the agricultural interests argued for lower rates on the products of agriculture on the ground that the industry was in a depressed condition. These pleas were, as a rule, unsuccessful. The soundness of the Commission's reasoning on the question of reducing rates to help a distressed industry cannot be questioned. If the rates are reduced to help out one industry, the burden of the reduction must be borne by the railroads or shifted to other shippers and consumers by increasing the rates on other products. The railroad is not an eleemosynary institution and ought not to be required to forego reasonable compensation for the services it renders. *** [Footnotes omitted.]

The next transportation characteristic—value of service—is perhaps the least understood and most frequently maligned of the factors influencing the establishment of the relationship of transportation charges. Here again, however, what the railroads and other domestic transportation companies long have done is wholly analogous to the practice that universally obtains in commerce and industry. Manufacturers and merchants routinely assess the market demand for their products and price them accordingly. An item that may be very much in demand one day, commanding a correspondingly high price, the next day may become a glut on the market, not to be sold at any price as the fashion may have changed. Thus, for example, today there might be few takers for Daniel Boone coonskin caps even if they were virtually given away. On the other hand, as the demand for a product surges, so does its price, as anyone who was lucky enough not to have thrown out his grandmother's coffee

mill, mason jars, or other items now prized as antiques will testify. If such pricing in accordance with the elasticity of demand constitutes charging what the traffic will bear, then that is nothing more than an economic fact of life.

The traditional railroad rate structure of this country was characterized by value of service pricing. The railroads were known freely to charge their shippers what the traffic would bear. With the advent of the motor carriers, pipelines, and other competitors for freight and with the competition for traffic having become intense and pervasive, as we find it to be today, it has been urged that value of service no longer is an appropriate factor to be considered in the setting of transportation rates and charges. This misapprehends completely the role of value of service, for the intensity and pervasiveness of today's competition have not diminished in any way the relevance of elasticity of demand as a matter to be taken into account in setting railroad rates and charges; the elasticity of demand for railroad service has increased greatly and shippers of freight will divert their traffic to alternative modes when confronted by increased railroad charges more so than they ever have been able to do before.

Professor Way in *Elements of Freight Traffic* (1956), pp. 124-25, explained the role of value of service under contemporary conditions as follows:

> Value of service should not be confused with value of the shipment. Although in traffic matters there is a definite relationship between the two, each is different. The former refers to the transportation service performed by carriers; the latter, to some particular commodity itself. A relatively high rating of a high-valued article results in a freight rate which is higher than one obtained from a low rating; but the resultant high rate is a small proportion of the selling price of the high-valued article, in contrast to a low rating of a cheap commodity resulting in a rate which is a substantial part of its price. Therefore, even the resulting low rate on a low-valued commodity has much greater influence both upon its selling price and the consequent demand of the public for it, than a high rate on high-valued articles. Consequently, relatively high ratings do not restrict shipments of high-valued goods nearly as much as they influence the geographical extent of markets for low-valued goods, which means value of service is much greater and more sensitive for shippers of low-valued commodities than for shippers of high-valued commodities. The former are able and willing to pay less than the latter for transportation service, because the freight rate is a greater direct part of the former's cost of production and distribution than to latter's.
>
> This situation is recognized by the carriers in rating determination, for they realize any action on their part which restricts the demand for an article itself, by an appreciable proportionate increase in its price, will reduce the demand of shippers of that article for transportation service. It is for this reason that there is such wide divergence among ratings and that "Exceptions," which will be explained later, have

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been adopted. Of course, no rating can be so low, regardless of the value of service and ultimate loss of traffic, that the applicable rate will produce revenue at least no less than the carrier's out-of-pocket costs of providing the service. While value of service to the shipper constitutes the highest level of rates, costs to the carrier of furnishing the service represent the lowest level. In practically all instances, the rating of a particular article falls somewhere between the two extremes, depending entirely upon the influence of the other classification factors as they are applied to individual situations. [Footnote omitted.]

Finally, the last of the transportation characteristics which have been listed as influencing the classification of freight—competition with other commodities transported—is perhaps the most important one in evaluating properly the contention advanced herein that the railroad rate structure discriminates against secondary materials. Only recently, we received the decision of the United States District Court for the Western District of New York in Civil Action No. 1971-542, *National Gypsum Company, et al.* v. *United States, et al.*, 353 F. Supp. 941 (decided February 5, 1973), which clearly and concisely reiterates the principles which obtain in assessing the importance of competition as a factor in explaining disparate rates.

Involved in that case were disparate railroad rates from nine origins in West Virginia, Ohio, Pennsylvania, and Kentucky to the port of Toledo, Ohio. The plaintiffs were receivers of metallurgical coal, and alleged that the lower rates that the railroads assessed on steam coal were discriminatory, in violation of section 2 of the Interstate Commerce Act. The Court said:

For many years the Supreme Court has recognized that the carrier's necessity of meeting competitive conditions in order to retain business is an important consideration, which may provide a sufficient dissimilarity of conditions to warrant a reasonable difference in rates that will not be classified as unjustly discriminatory. In *Texas & Pac. Railway* v. *Interstate Commerce Commission*, 162 U.S. 197 (1896), the Texas & Pacific published a lower rate for transportation from New Orleans to California of traffic imported from Europe than for carriage of identical domestic traffic between the same points. The lower rate was justified as necessary to avoid the loss of the European traffic altogether to competition which would transport it to the California coast by water. Upholding the discrimination as justified, the Court stated:

We think that Congress has here pointed out that, in considering questions of this sort, the Commission is not only to consider the wishes and interests of the shippers and merchants of large cities, but to consider also the desire and advantage of the carriers in securing special forms of traffic, and the interest of the public that the carriers should secure that traffic, rather than abandon it, or not attempt to secure it. It is self-evident that many cases may and do arise where, although the object of the carriers is to secure the traffic for their own purposes and upon their own lines, yet, nevertheless, the very fact that they seek, by the charges they make, to secure it, operates in the interest of the public.

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. . . . . .

The principal purpose of the second section is to prevent unjust discrimination between shippers. It implies that, in deciding whether differences in charges, in given cases, were or were not unjust, there must be a consideration of the several questions whether the services rendered were "like and contemporaneous," whether the kinds of traffic were "like," whether the transportation was effected under "substantially similar circumstances and conditions." To answer such questions, in any case coming before the Commission, requires an investigation into the facts; and we think that Congress must have intended that whatever would be regarded by common carriers, apart from the operation of the statute, as matters which warranted differences in charges, ought to be considered in forming a judgment whether such differences were or were not "unjust." Some charges might be unjust to shippers—others might be unjust to the carriers. The rights and interests of both must under the terms of the act, be regarded by the Commission. 162 U.S. 197, 218-19.

We are not persuaded by plaintiffs' contention that the teaching of *Texas & Pac. Railway* is limited to a difference between import and domestic traffic. The basis of the decision is much broader than that. It is grounded upon the principle that the necessity of meeting competition in order to retain traffic is a circumstance that will be given heavy weight in deciding whether a difference in rates is unjust or unreasonable. Just as the railroads were entitled in *Texas & Pac. Railway* to publish lower rates on import traffic in order to induce it to move through the affected ports rather than use cheaper water transportation, the railroads were here entitled to do likewise in order to avoid a very substantial loss of business and resulting revenue that might well have required them to charge even higher rates to plaintiffs than at present in order to meet the higher operating costs per ton that would result from the decline in volume of traffic.

The viability of the principle established by *Texas & Pac. Railway* has repeatedly been confirmed. *Barringer & Co.* v. *United States*, 319 U.S. 1 (1943) (railroad permitted to eliminate a loading charge for cotton destined for Gulf ports in order to meet truck competition but to retain charge on cotton destined for other southeastern ports); *Koppers Company* v. *United States*, 166 F. Supp. 96, 101 (W.D. Pa. 1958); *Coal to New York Harbor*, 311 I.C.C. 355 (1960); *Consolidated Edison Co. of New York, Inc.* v. *Virginian Ry. Co.*, 292 I.C.C. 23, 35-38 (1954); *Reduced Rates on Coal from the East to the Northwest*, 292 I.C.C. 119, 137-38 (1954); *Coal from Ky., Va., and West Va. to Virginia*, 308 I.C.C. 99 (1959); *Wyandotte Chemicals Corporation* v. *The Baltimore and Ohio Railroad Company, et al.* (not published) I.C.C. Dkt. No. 34460 (Sub-No. 1), decided June, 1965. The Commission's settled construction of §2 is entitled to the "highest respect." *United States* v. *Missouri Pacific R. Co.*, 278 U.S. 269, 280 (1929).

The foregoing presents a summary of the foremost transportation characteristics which, as we noted at the outset, are considered in the classification of freight. While any one of the transportation characteristics, considered alone, might appear to warrant a higher or lower classification rating of particular freight, all of them are taken into consideration, and no one of them is controlling. *Vacuum*

Cleaner Mfrs. Assn. v. *Atchison, T. & S. F. Ry. Co.*, 276 I.C.C. 783, 792 (1950); *Class Rate Investigation, 1939*, 262 I.C.C. 447, 508 (1945); *Nashville Traffic Bureau* v. *L. & N. R. R. Co.*, 68 I.C.C. 623, 626 (1922); and *McCory Stores Corp.* v. *Director General*, 55 I.C.C. 423, 424 (1919).

It is well known, however, that relatively little freight transported by the Nation's railroads moves solely in accordance with these principles, or upon class rates. Rather, approximately 90 percent of the railroads' traffic moves on so-called commodity rates. Commodity rates long have been recognized as a concession to a particular situation that requires departure from the basic rate structure embodied in the schedules of class rates. "[C]ommodity rates are special rates which ought to be made with reference to all the conditions surrounding the transportation of the particular articles between the particular points." *The Mississippi River Case*, 28 I.C.C. 47, 63 (1913); and *Railroad Commission of Louisiana* v. *A. H. T. Ry. Co.*, 48 I.C.C. 312, 369 (1918).[10]

An observer, Landon, in *Transportation*, 315 (1951), noted:

> *Commodity rates* are special rates for products that move in large volume, such as lumber, wheat, coal, iron ore, cotton, and many others. They are lower than the applicable class rates and are usually carload rates. Commodity rates as low as 8 percent of the first-class rates applying in particular areas are numerous for articles unable to bear higher charges.

The nature of the commodites that are apt to be accorded commodity rates permits the generalization, as made by Van Metre in *Industrial Traffic Management*, 28 (1953), that "While the number of shipments charged class rates is much greater than the number of shipments that are charged commodity rates for their transportation, the volume of traffic moving under commodity rates is far greater than the volume of traffic moving under class rates."

In establishing commodity rates railroads take into account additional factors, among which the most prominent are the volume of the movement in question, its regularity, duration, direction, and length. We next shall consider these.

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[10] Wyman in Railroad Rate Regulation 423 (Ed. 1915) stated:

> The principle on which such [commodity] rates are established is doubtless a sound one. The articles which are granted commodity rates are staples of comparatively low value, like grain, lumber, and salt, moving in great quantities over roads of which they form a large part of their traffic. A granger road, carrying great quantities of grain in bulk, is in an entirely different position as to traffic in grain from a road in another part of the country carrying small quantities from time to time to the small consumer; and while the traffic of the latter road can be classified, that of the former requires special treatment.

An obvious determinent of the level of rates to be assessed is the size of the shipment. Certain costs are incurred by a railroad regardless of how large or how small a shipment may be, and these include the costs attending the preparation of the bill of lading, the rendition of a statement of charges owing, the tracing of the shipment if astray, or the processing of a claim if damaged or lost in transit. Such costs are substantially the same whether the carrier handles a 40-pound shipment or a 40,000-pound shipment; and, therefore, all things being equal, the rate per 100 pounds for handling the former should be substantially higher than that which applies on the latter. In transportation parlance, it is axiomatic that LTL rates should be higher than truckload; LCL rates, higher than carload.

This relationship is no less valid when only volume shipments are considered, particularly in the case of the railroads. In other words, certain costs are incurred by a railroad regardless of how many carloads of freight comprise a shipment. Apart from the housekeeping or overhead costs previously enumerated, there are those related to picking up and spotting the cars that are the same or substantially so regardless of the number of cars involved. Dispatching the locomotive, switching it to the siding, pulling the cars to the assembly or classification yards at origin, and the reverse procedure at destination are similar whether the shipments consist of 1 car or 10. Therefore, once again, all things being equal, the rate per 100 pounds for handling the former should be substantially higher than that which applies on the latter. In transportation parlance, it has become commonplace that carload rates should be higher than multiple carload or trainload rates. This, then, is a function of the volume of the movement in question.

In considering the rate relationships between iron ore and scrap iron and steel, we have examined waybills in our files attending the movement of scrap from Curtis Bay, Md. (Baltimore), to Steelton, Pa. (Harrisburg). Without in any way suggesting that these are representative, but noting that actual traffic was moving between those points, the scrap rates for this movement are (B&O Tariff 488-A, suppl. 123, ICC No. 24822):

Weight of shipment	*Rate Per gross ton*
44,800 pounds	$8.17
80,000 pounds	7.19
600 gross tons in not more than 12 cars	5.02
900 gross tons in not more than 18 cars	4.45
1,200 gross tons in not more than 24 cars	3.87

This table of rates shows that volume shipments are in fact accorded lower rates. As can be seen, a 1,200-gross ton shipment, which is substantially below a unit-train lot, bears a rate roughly one-half that of the single-car rates. We have examined several random waybills covering actual movements under this tariff and found three single-car shipments of about 115,000 pounds each at a rate of $7.19 per gross ton, and an 18-car shipment of 68 gross tons (76.2 net tons) per car at a rate of $3.87 per gross ton.

Another example of the relationship between rates and weight of a shipment is shown by the following rates on cotton refuse (Tariff SFA S-2011-M, ICC No. S-1019):

From East Point, Ga. (Atlanta), to Memphis, Tenn.		From Stonewall, Miss., to Memphis, Tenn.	
Minimum weight—pounds	Rate—cents per 100 pounds	Minimum weight	Rate
20,000	105	20,000	83
30,000	71	30,000	57
40,000	63	40,000	52
Excess over 40,000	52	Excess over 40,000	41

Thus, by heavy loading, shippers can take advantage of rates which are almost one-half of the maximum rates.

As for its regularity, it requires little elaboration that a railroad which can anticipate pulling three cars of freight daily from a particular industry can plan more efficiently and, hence, can operate more economically than it can to an industry that has no requirements 1 week and then tenders a shipment of 18 cars the first day of the following week. Although the two shippers may be the source of an equal amount of traffic for the railroad, it would not be unreasonable for the former to be accorded a more favorable rate than the latter. Similarly, it requires little or no elaboration to justify lower rates when the movements reasonably can be expected to continue for several years than when their duration is anticipated to be short lived.

Direction is a factor whenever a railroad experiences an imbalance in the flow of freight. One of the most interesting examples of the influence of this factor which we encountered in recent years involved a railroad engaged in the transportation of

phosphate in hopper cars from Florida. In order to avoid the empty return of its equipment, the railroad published drastically reduced barge-competitive rates on coal, thereby achieving a balanced movement.

Finally, the length of the movement is a factor to be considered in establishing the relationship of rates for many of the same reasons that volume is. Essentially, terminal costs, the costs incurred in originating and terminating the movements, remain identical whether the intervening line-haul transportation is 50 miles or 500 miles. Therefore, all things being equal, the rate per 100 pounds for handling the former should be substantially higher than that which applies on the latter.

It is against a background of these many, varied, and yet significant factors that enter into the establishment of the relationships that obtain in the railroad rate structure that the axiom that a mere disparity in rates does not establish discrimination or undue preference, assumes real meaning. It is against the background of these that we conclude that no case for discrimination or undue preference has been made by arguing that the railroads as a group in 1965, may have received an average of 2.5 times as much per hundredweight for transporting iron and steel scrap than they did for handling iron ore.

The comparison between the average revenue per 100 pounds on iron and steel scrap and iron ore reveals very little; it certainly does not establish that the former was disadvantaged in relation to the latter. It tells us nothing about the transportation characteristics we just have discussed. It provides no information as to the lengths of the movements making up the average, and whether the hauls of iron and steel scrap may not have been considerably shorter than those of the iron ore. It tells us nothing of the duration of the movements and their regularity, and whether the movements of iron and steel scrap may not have been far more sporadic and cyclical than those of the iron ore. It fails to inform us as to the volume of the movements going into the average, and whether the tonnages tendered of iron and steel scrap may have been far less than those of iron ore. Our experience, our prior cases, and, indeed, the record herein suggest that each one of these transportation characteristics, relevant to a comparison of the rates, may not be nearly as favorable for iron and steel scrap as for iron ore. The Institute's simplistic argument tells us nothing of the density of the commodities, and whether iron and steel scrap, particularly before shredding or

compacting, may not be lighter than iron ore. It provides no data as to the ease of loading and unloading of the commodities and of their tendency to damage the carriers' equipment, and whether iron and steel scrap may not be dumped into gondolas from magnetic or clamshell cranes, whereas, iron ore flows into hoppers from overhead bins or conveyors. It tells us nothing of the intensity of competition in the trade, and whether iron and steel scrap is the subject of the kind of competition that is characteristic of the iron ore area. Again, our experience, our prior cases, and, indeed, the record herein suggest that each of these factors may not be nearly as favorable for iron and steel scrap in comparison to iron ore.

As we have indicated, the cost of transporting a commodity by rail is affected by the volume in which it moves. All things being equal, if the volume of movement is large, a carrier is in a position to organize better its operations and methods of handling the commodity and so reduce the cost of carrying the freight (i.e., the costs directly assignable to the commodity). However, in order for a large volume of movement to justify a lower rate on one article than on another, the larger volume should actually lower direct costs. The most striking example of this principle occurs where the volume of traffic in a single commodity permits its movement in continuous, solid trainloads. Iron ore with a number of economical attributes is an excellent illustration of such a distinctive transport pattern. Iron ore is a dense, homogenous material, which moves in huge volumes from the mines or transshipping ports (i.e., iron ore frequently moves in trainload quantities of 100 or more cars), and requires little or no special, individual handling. Moreover, high density permits heavy loading per car, and homogenity eliminates the need for detailed identification and the concomitant costs thereof. Additionally, the absence of individualized handling requirements also lowers the cost per movement. Over a period of time, however, specific types of vessels and rolling stock adapted to the iron ore movement have been developed; docks equipped with special bulk mechanical handling devices for loading and unloading the freight at both ends of the haul have been brought into use; and railroad yards have been designed with particular reference to the traffic. The actual effect of such volume movements can readily be observed in the operations of the Duluth, Missabe and Iron Range Ry. Company and the Bessemer and Lake Erie Railroad Company. For instance, the D.M.&I.R., which originates roughly 35 percent of the total iron ore tonnage and derives approximately 88 percent of its total freight revenue from these movements has specialized its

handling to a point where its entire systemwide operating ratio has been lowered to 65.1 percent. The B&LE, although not handling as much iron ore traffic as the D.M.&I.R., nevertheless has a comparable systemwide operating ratio of some 62.5 percent. Iron ore movements account for almost 54 percent of Bessemer's total freight revenue. In those instances where iron ore traffic is not as significant to, or the movements are not as continuous for, an originating railroad, the operating ratios are higher.

In direct contrast to concentration of iron ore movements the iron and steel scrap flow pattern is diffused and, except for Penn Central, the tonnage is rather thinly spread out among almost all of the Nation's 68 class I railroads.

In essence, iron ore moves largely over a few single-line direct routes, whereas scrap moves via many railroads mainly in single carloads over a multiplicity of routes, some of which are extremely circuitous. Furthermore, the tendency of scrap to originate over broad areas for concentration, and to some extent fabrication, and then to disperse over other destination areas necessitates a transport system replete with feeder and secondary routes supporting the main intercity arteries. Such a scattered type of flow pattern can be expected to cause a few cost and service deficiency problems as noted by the shippers of scrap iron and steel in Ex Parte Nos. 265 and 267 (i.e., excessive transit time, terminal and interchange delays, car shortages, bunching of cars, et cetera.[11]

Regularity of movement is also a most important factor entering into the measurement of relative cost of railroad service. If traffic moves regularly, it can be transported with greater economy (i.e., more economical train schedules can be worked out, and empty cars can be supplied with a minimum of expense, et cetera. On the other hand, irregularity of movements has the opposite effect. This is particularly true when there is a distinctly seasonal movement, such as certain types of scrap, which taxes the carrier's facilities at certain times and results in idle equipment and facilities at others.

The economic advantages inherent in the movement of iron ore in the highly specialized open-top hopper car with its drop frame that allows for an unloading in one swift motion, as compared to its movement in the gondola car are significant irrespective of the territory in which they operate.

With respect to the terminal investment required by the various carriers, that also differs materially depending upon the predominant type of traffic in which the carrier is engaged. Thus,

[11]Ex Parte Nos. 265 and 267, *Increased Freight Rates, 1970 and 1971*, 339 I.C.C. 125.

railroads which specialize in iron ore traffic moving directly from the mines require facilities entirely different from those carriers serving a highly industrialized territory. In contrast to the simplicity of the iron ore operation the latter situation requires an intensive system of switching lines and siding connection to accommodate a great number of industries. In a large industrial area, such as that of the official territory, this results in great dispersion in the origination and termination of freight, commonly requiring a number of switching yards serving each section in the industrial district. The operation is often conducted under extremely congested conditions. High land values and the built-up nature of adjacent lands makes expansion or improvements possible only at prohibitive costs. In consequence, expanded freight business must be handled by existing facilities under a system of most intensive operation, and unit costs accordingly are obviously high.

Data drawn from the railroads' experience in official territory, the industrial heartland of America, will permit a meaningful comparison to be made between the two categories of commodities. Within official territory are the Great Lakes ports of Cleveland and Toledo, important in the movement of domestic iron ore, and the Atlantic Ocean ports of Philadelphia and Baltimore, gateways in the movement of import iron ore. Here are the iron and steel centers of Gary, Youngstown, Pittsburgh, Fairless, and Sparrows Point, and finally, within the territory the greatest amounts of iron and steel scrap, both home and waste, are generated. Indeed Penn Central Transportation Company, which blankets the area like no other railroad, alone originates about one-third of all of the iron and steel scrap transported within the United States.

We find that, within official territory, carloads of iron ore load far more heavily than carloads of iron and steel scrap; as a matter of fact, carloads of iron ore consistently average nearly half again the weight of carloads of iron and steel scrap. Similarly, we find that iron ore travels further than iron and steel scrap; the average haul per car of iron ore has been nearly twice that of iron and steel scrap.[12]

[12] In *Price-Watson* v. *Elgin, J. & E. Ry. Co.*, 329 I.C.C. 736, 740 (1967), sustained, *Price-Watson Co.* v. *United States*, 287 F. Supp. 872 (N.D. Ill. 1968), we noted that the average haul of scrap iron in official territory was only 84 miles. This compares with our findings in *Increased Rates on Iron Ore*, 313 I.C.C. 549, 566 (1961), that about the same time the average haul of iron ore was 142 miles on ex-lake traffic and 357 miles on import traffic. The railroads serving the eastern district transported a total of 55.5 million net tons of iron ore, that traffic comprising 5.18 percent of their tonnage and 2.8 percent of their revenue. *Id.* 313 I.C.C. at 551.

	Iron ore		Iron and steel scrap	
	Average ton per car	Average haul per car	Average ton per car	Average haul per car
1964	76.0	184	53.4	96
1965	77.7	186	53.4	95
1966	78.7	178	54.1	107
1969	77.6	194	55.5	103

Source: Carload Waybill Statistics.

At the same time, the rate disparity between iron ore and iron and steel scrap moving in official territory is not as great as it is generally represented to be. In 1966, the average revenue per hundredweight earned by the railroads in handling iron ore was 60 percent of that of the average revenue earned on iron and steel scrap. In 1969, it was 55 percent. However, the more significant earnings figure, average revenue per car, was not nearly as disparate. In 1966, the average revenue per car of iron ore was 85 percent that of iron and steel scrap, and in 1969, 80 percent.

	Iron ore		Iron and steel scrap	
	Average revenue		Average revenue	
	Per hundredweight	Per car	Per hundredweight	Per car
1966	11.1	174	18.9	205
1969	11.5	179	20.8	231

Source: Carload Waybill Statistics.

Indeed, we find that some of the rates maintained by the railroads on comparable movements of iron ore and iron and steel scrap are not dissimilar. For example, the multiple-car rate on iron and steel scrap from Curtis Bay (Baltimore), Md., to Steelton (Harrisburg), Pa., is $3.87 per gross ton, whereas, the rate on iron ore is $3.57. Baltimore & Ohio Railroad, Tariff No. 4988, ICC No. 24822, Supplement 123, item 630B, and Tariff No. 1014, ICC No. 24789, Supplement 141, item 3115E.

Even at the slightly lower rates at which the official territory railroads handle iron ore than they transport iron and steel scrap, they find they are making more money on the former than they are on the latter. Using an average shipment of about 72 carloads of over

76 tons each as an example, we have calculated that railroads' variable cost per ton for the above movement of iron ore and iron and steel scrap. The results were developed through procedures from Statement No. ICI-69, *Rail Carload Cost Scales by Territories for the Year 1969*, issued as information by our Bureau of Accounts, but not adopted by us. The calculation establishes that the carriers' variable cost per gross ton of iron ore is about $1.70 while that for scrap is about $2.28. This difference in costs ($0.58) it will be noted is larger than the difference in rates ($0.30).

Within official territory both the terminal and the through-train line-haul costs in handling iron ore in hopper cars are lower than they are for handling iron and steel scrap in gondola cars.

	1969 terminal costs per carload	1969 line-haul costs per car-mile
	Cents	*Cents*
Iron ore	5406.670	25.21934
Iron and steel scrap	9134.915	28.37805

Source: Section of Cost Finding.

Stated differently, the revenue contribution that iron ore makes to burden is greater on a variable cost basis but less on a fully allocated cost basis than the revenue contribution of the iron and steel scrap movements in official territory.

	1969 contribution to variable costs	1969 contribution to fully allocated costs
	Percent	*Percent*
Iron ore	143.1	103.8
Iron and steel scrap	137.8	120.1

Source: Department of Transportation.

We do not believe the foregoing comparisons of the movements of iron ore and iron and steel scrap fairly permit the conclusion that the rate disparity between these groups of commodities has unduly preferred the former and discriminated against the latter. Our prior decisions generally have been to the same effect.

Only a few years ago we were called upon expressly to respond to the contention that the rail rates on scrap iron and steel were unduly prejudicial in relation to those on iron ore. *Institute of Scrap Iron & Steel, Inc.*, v. *Akron, C. & Y. R.*, 316 I.C.C. 55 (1962),

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sustained *sub nom. Frank Adams & Co.* v. *United States* (unreported, C.A. No. 5093, S.D. Ohio, May 8, 1963), affirmed mem., 375 U.S. 215 (1963), rehearing denied, 276 U.S. 929 (1964). In dismissing the complaint of the Institute of Scrap Iron & Steel, Inc., 316 I.C.C. at 67, we specially noted that, "* * * the transportation characteristics of iron ore, * * * and scrap differ widely." We compared the two groups of commodities, 316 I.C.C. at 62-63, as follows:

> The movement of iron ore is highly concentrated. Ninety percent of the total traffic moves from seven Lake ports and three north Atlantic ports, and is delivered to the railroads by vessels in quantities averaging over 12,000 gross tons at the Lake ports and 23,000 gross tons at the Atlantic ports. The remainder of the iron ore traffic originates at eight domestic mine origins and moves in quantities amounting either to trainloads or substantial fractions of trainloads. The entire traffic, amounting to over 60 million net tons in 1957, is delivered at approximately 90 destinations where blast furnaces are located. By contrast, scrap iron moves from many points, 501 origins in a typical month. A study made by the Bethelehm Steel Company showed 263 origins, with individual plants receiving scrap from as many as 115 origins. Although the origin and destination points for iron ore are constant from year to year, there are frequent changes in the origins from which particular mills obtain their scrap.
>
> The average weight per carload differs widely, iron ore loading in excess of 70 net tons and scrap to 50 net tons. While iron ore moves largely over single-line direct routes, scrap moves over a multiplicity of routes, some of which are extremely circuitous. Because iron ore is frequently delivered to the railroads in quantities in excess of trainloads, it does not require the very expensive terminal services involved in way train and classification-yard services which are characteristic of the movement of any commodity such as scrap, where the typical movement is a single carload. Both iron ore and scrap are transported in open-top equipment, but this is true of about 58 percent of all the carload traffic within official territory. Iron ore rates have never been related to the rates on scrap, but have been designed to suit the needs of the iron ore traffic, ex-lake, ex-tidewater, and locally within eastern territory, and in the light of competition between lakefront and seaboard mills, on the one hand, and interior furnances, on the other.

In *Price-Watson* v. *Elgin J. & E. Ry. Co., supra,* we concluded:

> The rates on scrap iron and on other raw materials of the steel industry have always been made to reflect circumstances and conditions particular to each transportation service. The complainants' rate comparisons relate almost exclusively to long hauls. As pointed out, scrap iron within official territory moves mostly for short hauls, which is not true of the other traffic with which comparison is thus made. An analysis of the short-haul movement in the traffic study shows that out of a total of approximately 4,300 carloads which moved for a short-line distance of 50 miles or less, about 3,200 moved for the account of members of the Institute. The rates at which the traffic moved reflected an average of approximately 10 percent of first class. Many of the rates shown by the complainants are between points where there is no movement. For the most part, the prevailing scrap iron rates at the 87-percent basis are lower than the

pig iron rates, despite the fact that pig iron has an 18-percent higher average loading than scrap iron. Moreover, some of the pig iron rates used for comparative purposes have been reduced to meet water competition; for example, the water-competitive rates from Buffalo, N.Y., to Philadelphia and Baltimore, and the water-truck competitive rates from Buffalo to Coatesville and Phoenixville, Pa.

Undue preference and prejudice must be shown by clear and convincing evidence. Substantial similarity in transportation conditions, and a real disadvantage by reason of the assailed rates, must be shown. Such a showing has not been made on this record.

* * *

When the railroads sought our authorization for the general rate increases of 1969, the Institute of Scrap Iron and Steel, Inc., reiterated the contention that the rates on iron and steel scrap were prejudicial, pointing to, among other things, the iron content of such scrap and iron ore as a further basis for supporting the claim of discriminatory pricing. In *Increased Freight Rates, 1969*, 337 I.C.C. 436, 474 (1970), we held:

We find no merit in the Institute's contentions. In the context of the issues in this proceeding we cannot go behind the basic rates in effect November 17, 1969. Moreover, the basic rate structures for iron ore, pig iron, and scrap iron are entirely unrelated. *Institute of Scrap Iron & Steel, Inc.* v. *Akron, C. & Y. R.*, 316 I.C.C. 55. As in Ex Parte No. 259, we conclude that, "while the rates on these various commodities are not necessarily related, we are of the opinion that, under current conditions, and where the issues involve the increase in contribution necessary to meet a revenue need, the burden should be imposed in substantially similar fashion." (332 I.C.C. at 743.) The uniform 6-percent increase applied to the basic rates on these commodities will accomplish this purpose. We find no violation of section 2 or 3 in the manner in which the 6-percent increase has been applied on iron ore, pig iron, and scrap iron.

In the next general increase proceeding, begun after the enactment of the National Environmental Policy Act of 1969, the Institute added the argument that its allegation of discriminatory pricing was further buttressed by the provisions and purposes of that legislation. In *Increased Freight Rates, 1970 and 1971*, 339 I.C.C. 125, 205 (1971), we said:

Protestants assert that a low-grade commodity such as iron and steel scrap is extremely sensitive to changes in freight rates. Between 1961 and 1966, when there were no general freight rate increases, the price of scrap fluctuated between $24 and $39 per ton. The price of No. 1 heavy melting scrap increased from $27.64 per gross ton in 1967 to $43.50 in 1970, an increase of nearly 60 percent, in spite of the increased freight rates during that same period. The prices of pig iron and iron ore advanced only slightly. In addition, protestant's figures for the ratio of purchased scrap consumed show erratic behavior during those years. The position of purchased scrap improved from 19.9 percent in 1966 to 20.3 percent in 1967, and again to 20.9 percent in 1968, followed by a drop to 19.4 percent in 1969. The only conclusion

warranted on this record is that there is little, if any, correlation between rail freight rates and the market for iron and steel scrap. We are not persuaded that rail freight rates on scrap have any material impact on the decisions which result in removal of wrecked automobiles and other scrap metals pursuant to antipollution measures.

Responding specifically to the suggestion that their iron content required similar rates on iron and steel scrap and iron ore, it was concluded, 339 I.C.C. at 207:

There are differences in the transportation service performed by the railroads in connection with ferrous scrap and iron ore, including differences in the average length of haul, average weight per car, average size of shipment, and regularity of movement and general distribution. Evidence offered by the protestants, including testimony of expert witnesses, generally to the effect that all metallic sources compete, is not persuasive of their contention that scrap iron and iron ore specifically and directly compete to the extent that they require similar rate treatment. In the light of the demonstrated intervening processing required of ore to transform it into a competing product, we adhere to our conclusions in *Institute of Scrap Iron & Steel, Inc.* v. *Akron, C. & Y. R.*, 316 I.C.C. 55. In our recent decision in Ex Parte No. 262 we found that a uniform percentage increase applied to the basic rates on both scrap iron and iron ore was equitable to both. We are not persuaded that the competition between these two commodities is so direct as to require any different finding in this proceeding.

In our earlier report, served October 4, 1972, we noted, 341 I.C.C. at 408-409, that the Institute again was advancing its argument of alleged discrimination between iron ore and iron and steel scrap based upon their metallic content:

According to protestant, the Battelle formula presents a fair basis for relating the competition between ore and scrap as metallic sources. Thus, iron and steel scrap and iron ore are competitors in the sense that they both yield iron units usable at a profit in the steelmaking process. The main difference between the competitive inputs is that iron ore requires reduction from oxide to metallic form prior to use; the reduction of iron ores confers equivalence with the iron found in ferrous scrap.

Battelle reduced the metallurgical formula to an equivalence reflecting the estimated share of rail movement of the various commodities: thus, 74 percent of the scrap iron and steel consumed moves by rail, 58 percent of iron ore, and 65 percent of metallurgical coal. Again, we are not persuaded that this distinction is necessary or proper. Battelle utilized the 1-percent waybill statistics for 1966 to determine average revenue per hundredweight for each commodity: 20.6 cents for scrap, 8.2 cents for iron ore, and 14.2 cents for coal. When these revenue data are inserted into the adjusted equivalence formula, the rate equivalence fails by the amount of $1.49 per ton. Thus, Battelle concludes the rate structure is, on the average, prejudicial against the movement of iron and steel scrap, or prefers the movement of iron ore, by $1.49 per ton. On the basis of this $1.49 rate disadvantage for scrap at the 1966 level, Battelle concluded that the excess cost per net ton of raw steel made from purchased scrap is $4.21. In terms of relative importance, it is generally estimated that the cost to manufacture a net ton of raw steel is approximately $69 to $74 per ton of ingot.

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Thus, on this basis, the impact of the railroad rate differentiation amounts to approximately 6 percent of total costs.

We recited the railroads' response, 341 I.C.C. at 409-410, as follows:

In rebuttal, respondents apply the basic Battelle formula to demonstrate that the proposed percentage increases actually favor scrap iron in relation to hot metal in terms of total transportation costs. As stated, the Battelle formula equates 2,000 pounds of ferrous scrap with 3,167 pounds of iron ore plus 602 pounds of coal. The latter are stated as the components required to produce 1 ton of hot metal, or molten pig iron. The application of the proposed 4-percent increase to 2,000 pounds (1 net ton) of scrap iron would mean an increase of 20.92 cents. The 4-percent increases applied to 3,167 pounds of iron ore (average rate $3.29 per gross ton) and 602 pounds of coal (average rate $3.45 per net ton) totals 22.8 cents.

Effect of Percentage Increase on Scrap Iron and Components of Hot Metal

2,000 pounds of scrap iron - Average rate $5.86 gross ton
- Average rate $5.23 net ton

$5.23 net ton x 1 ton = $5.23

3,167 pounds of iron ore (1.5835 net tons) - Average rate $3.29 gross ton
- Average rate $2.94 net ton

$2.94 net ton x 1.5835 net tons = $4.655

602 pounds of metallurgical coal (0.301 net tons) - Average rate $3.45 net ton

$3.45 x 0.301 = $1.04

Equivalents

	Scrap iron 2,000 pounds	Iron ore, 3,167 pounds Metallurgical coal 602 pounds
		$4.66 iron ore
		1.04 met. coal
	$5.23	$5.70
	0.04	0.04
Effect	20.92 cents	22.80 cents

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In the interim we have further analyzed the data submitted by the Institute and the railroads, and our analysis varies somewhat from those offered by these parties. As will be seen, this analysis is set forth in a subsequent section of this report after a discussion of the iron and steel scrap industry and iron and steel scrap technology.

The transportation characteristics and consequent rate treatment of another recyclable commodity, fly ash, stand in sharp contrast. Fly ash is a waste byproduct which results from the combustion of pulverized coal. It has a shipping weight of 70 to 75 pounds per cubic foot and will load in excess of 70 tons in a standard hopper car. It is an inert material which ordinarily moves in carload lots. It has had a constant value of $1.50 per ton for many years. In sum, fly ash is an extremely low-value, heavy-loading commodity which is not susceptible to theft and poses no threat of loss or damage claims. Since it is an inert material, it is not perishable.

Fly ash moves in either open or covered equipment depending on its ultimate use. If it is to be dumped as a waste, open equipment will suffice. However, it is handled most advantageously in covered equipment. If it is to be used commercially in a mixture with cement or as an asphalt additive, it must be shipped dry. If open cars are used for dry shipments, they must be covered to prevent the fly ash from blowing away or getting wet.

Fly ash is lower in value per ton than other commodities with similar pozzolanic uses, i.e., sand, $1.56; gravel, $1.89; crushed stone, $1.78; and volcanic ash, $1.85. In addition, fly ash ordinarily moves longer distances than these competitive commodities. In view of the low value of fly ash and the existence of readily available substitutes which can be produced locally, the level of rates is a crucial factor in the movement of fly ash.

In summary, fly ash has very favorable physical transportation characteristics. However, it requires the use of covered hopper equipment which is more expensive to the railroads. In addition, its low value and the availability of low-value substitutes presents a severe limitation on its ability to absorb transportation charges.

Fly ash has been included in the Uniform Freight Classification since 1939, at 17.5 percent of first-class rates, in carloads, minimum 50,000 pounds. However, almost all movements of fly ash have been on lower commodity rates.

The first comprehensive investigation of fly ash rates took place in 1954 under the heading, *Fly Ash, Chicago and Trenton, Mich., to Official Points*, 292 I.C.C. 349. This proceeding embraced five additional investigations of rates, including one initiated by the

Commission on its own motion to arrive at a level of rates for application throughout the country.

The Commission examined the level of rates on fly ash then prevailing in the various rate territories, and found it to be as follows:

Distance	Official territory industrial sand scale	Southern territory No. 28300 class 17.5	Southwestern territory exceptions class 12	Western trunk-line territory exceptions class 12
Miles	*Cents*	*Cents*	*Cents*	*Cents*
200	317	520	421	467
400	414	720	551	653
800	559	1060	788	996
1,000	619	1200	875	1120

It was found that numerous commodity rates at lower levels existed in all territories which moved most of the traffic.

The carriers were seeking a dual basis of rates on fly ash dependent upon the type of equipment utilized and whether or not the fly ash had value as a pozzolanic material. The basis was supported by the cement interests, because fly ash displaces a portion of cement and has similar transportation characteristics. The shippers were seeking rates based on the industrial sand scale which ranged from 7 to 9 percent of first-class rates.

The Commission prescribed rates that were 9.5 percent of first class. The Commission looked to the level of commodity rates that was moving the traffic and the level of rates on similar low-value, heavy-loading commodities to determine a just and reasonable rate. The prescribed rate basis was approximately the same as coal cinders and industrial sand with some allowance for the cost of using more expensive covered equipment. The object of this rate basis was to permit the free movement of fly ash in competition with other pozzolans and other low-value commodities. The Commission refused to adopt the cement scale because fly ash has more favorable transportation characteristics and a lower value. Marketing conditions were assessed as well as the relative lengths of haul for the two commodities.

This prescription of rates has survived to this day subject to subsequent general freight rate increases. In Ex Parte No. 212, *Increased Freight Rates, 1958*, 302 I.C.C. 665, 696, the Commission acted to preserve low rates on long hauls of fly ash by ordering a 3-

percent increase with a maximum or holddown of 20 cents per ton. It was specifically noted that fly ash often had to move greater distances than sand, ground limestone, or volcanic ash. Fly ash was again limited to a 3-percent increase in Ex Parte No. 259, *Increased Freight Rates, 1968*, 332 I.C.C. 714, 778, 779. In Ex Parte Nos. 265 and 267, the Commission reiterated the fact that fly ash is one of the lowest value commodities moving by rail and that its f.o.b. price at Chicago $1.50 per ton. Fly ash rates were held down below the full increases authorized for other commodities. In Ex Parte No. 281, *Increased Freight Rates and Charges, 1972*, 341 I.C.C. 288, 427, 428, the 6-percent request of the carriers was pared down to 3 percent because of the low value of fly ash and environmental considerations.

Fly ash rates have been prescribed and maintained by the Commission at an extremely low level based on traditional classification principles. Both transportation characteristics and value of service considerations have played important parts in the movement of fly ash at low rates. Unfortunately, marketing conditions for fly ash have not improved substantially and the railroads cannot afford to subsidize either the disposal or long haul of this low-value commodity. The rates on the commodity have been accorded the utmost scrutiny by the Commission and are in line with those of other similar commodities.

Consideration of the transportation characteristics and the consequent rate treatment of iron and steel scrap, on the one hand, and, on the other, flay ash, offered as illustrative of the several categories of recyclable commodities, refutes the contention that the railroad rate structure discriminates against secondary materials in favor of primary materials. As we have sought to demonstrate, a mere disparity in the rates between them means very little in determining whether there is undue preference and prejudice, but we find little more than such rate differences offered in support of the charge of bias. We conclude there is no discrimination in the railroad rate structure applicable on reclyclable commodities.

Before turning to a consideration of the several groups of commodities suitable for recycling and a determination of whether the very limited percentage railroad rate increases we have approved for them will restrict their movement in relation to primary materials, we deem it appropriate to pause and consider the contention of some of the parties that the percentage increases we have authorized in railroad general rate increase proceedings the last severa years have aggravated the disparity in the rates

applicable to the recyclable and primary materials. The argument goes that the alleged bias that discriminates against the former to the advantage of the latter has been accentuated by the percentage increases that we have permitted the Nation's railroads to take. We find no merit in the argument.

Let us assume further that there are two commodities, commodity A, the recyclable product, and commodity B, the primary material. Let us assume from a rate base at which the rate on the former was 50 cents greater than the rate on the latter, the Commission authorized five successive increases of 10 percent each.

Increase	A	B
Base	100	50
1st	110	55
2d	121	61
3d	133	67
4th	146	74
5th	161	81

The argument goes that at the end of the fifth increase the difference between the two commodities is 80 cents rather than 50 cents, to the evident disadvantage of commodity A.[13]

Analysis of our cases will show, we are confident, that we have tempered the percentage increases with maxima and so-called holddowns found warranted upon a thorough consideration of all

[13]One conceivable alternative might be the authorization of increases only of equal amounts on both commodities, so as to maintain the 50 cent differential, perhaps, as follows:

Increase	A	B
Base	100	50
1st	110	60
2d	121	121
3d	133	83
4th	146	96
5th	161	111

Obviously, such an arrangement, satisfactory to the shippers of recyclable products, would be wholly unacceptable to the shippers of the primary material. The reason for their displeasure is evident, for, whereas at the outset the rates bore a relationship of 2 to 1, they ended up approximately 3 to 2. Moreover, the latter scheme may give an unwarranted windfall to the railroads, particularly if the primary material moves in considerably greater quantities than the recyclable products. The answer seems to lie somewhere between the two extremes of our illustrations, and we believe this is where our decisions have tended to be.

pertinent facts and circumstances. Such, of course, is our action herein, for we have held the rate increases on recyclables to no more than 3 percent (except as to iron and steel scrap on which the increases range from 3 to 5 percent), whereas, we have authorized other increases, mostly on nonrecyclable commodities, up to 6 percent.

An indication that such has been the pattern of rate increases is demonstrated by a comparison of the average revenue earned by the Nation's railroads on iron ore and iron and steel scrap. Both on the basis of the revenue per hundredweight and on the basis of revenue per carload the actual increase and the percentage increase in the earnings of the carriers between 1964 and 1969 was less for the recyclable materials than for the primary.

	Iron Ore		Iron and Steel Scrap	
	Revenue per cwt.	Revenue per car	Revenue per cwt.	Revenue per car
1964	8.6	125	20.7	216
1965	8.9	134	20.6	216
1966	8.2	125	20.6	218
1969	11.4	174	22.5	246
Difference 1964-1969	2.8	49	1.8	30
Percentage increase	33	39	9	14

Source: Carload Waybill Statistics

I. The Environmental Iimpact of the Proposed Actions

The remaining questions to be explored in this proceeding,[14] are: (1) whether increased rail freight rates will divert traffic from the railroads to other modes of transportation in degradation of our human environment, and (2) whether the proposed increased rail rates will adversely affect the movement (and hence, it is argued, the recycling) of secondary materials. These are the essential environmental questions here involved. Pursuant to our duty under the NEPA, we shall consider them fully in order to develop the full

[14] The decision of the court in *S.C.R.A.P. v. United States, supra*, which has been appealed to the Supreme Court, involved the environmental impact of the 2.5-percent surcharge. As noted above, the court stayed the effectiveness of the surcharge and concluded that the damage done to the environment is likely to be irreparable and cannot be undone by subsequent rebates to shippers since once raw materials are extracted from the ground and used, they cannot be returned from whence they came. It should be noted, however, that our findings with respect to the selective increases apply with equal, if not greater, force to the impact of the surcharge upon the environment.

range of impacts of the proposed rate increases unfettered by the traditional areas of our jurisdiction or expertise.

In this connection, the following from the prior report in this proceeding (341 I.C.C. 319-320) is apposite:

> Neither of these fundamental questions can be answered, we believe, without some reasoned consideration of how the responsibility for protecting the environment should be apportioned among the larger segments of our society. The rail carriers contend in this connection that the industry creating the waste in the first instance should bear the complete responsibility for disposing of such waste. On the other hand, industrial concerns and other shippers aver that they are fulfilling their environmental responsibilities by conducting environmental research, and that the railroads should bear the burden of transportation costs so that funds are not diverted from industry environmental research. These interests both contend that they are deeply concerned with the environment, but each would prefer to leave any sacrifices for ecological protection to its counterpart. In fact, however, environmental improvement is a national goal and all segments of our Nation—including industry, the railroads, governmental organizations, and private citizens—must cooperate to achieve that end.
>
> We are of the opinion that the creator of waste properly should be called upon to bear a major responsibility for disposing of that waste in an ecologically sound manner. Of course, other segments of our economy must not construct unnecessary or undesirable barriers to the economic disposal of such commodities. The railroads have transported waste and scrap products at just and reasonable rates for many years—indeed, before environmental aims became fashionable—and the increases approved in this proceeding will not, in our judgment, alter that pattern. ***

As we shall develop hereinafter, we are convinced from our study of the record, as well as our analysis of the evidence there presented in the light of all available source material (identified in appendix A to this report) and the comments of the parties as to the draft impact statement, that secondary materials, as well as the other commodities involved, will continue to move by rail with the same or greater frequency as before,[13] despite the selective rate increases we have approved. We further conclude that, without the revenue increases approved in this proceeding, the railroads would very likely be unable to provide the shipping public with the economical, efficient, and responsive service which it requires and which the national transportation policy requires us to assure. This Nation

[13] This conclusion results from our consideration of the present and future economic and environmental effects of the proposed action and not merely the incremental change in the situation since the last rail freight rate increases were permitted. We have explored the entire panorama of increased freight rates and the environment as well as the cumulative effects that past freight rate increases and the proposed increases have had and are likely to have upon the quality of the environment. The real-world statistical data embodied in the post-statement comments of the railroad respondents, as summarized in appendix E to this report, fully bear out our stated conviction.

would then be confronted with both economic and environmental crises. The services and operations of railroads unable properly to finance their activities necessarily will deteriorate, and either the traffic may then be diverted to other modes of transportation or it may not be transported at all. The following tables illustrate the revenue position of the railroads and the effect the overall proposed increases on all commodities were expected to have on these revenues:

TABLE 1

Railroads' development of estimated revenue yield

Item	United States	Eastern district	Southern district	Western district
1. Revenue ton-miles, January-June, 1971 (millions)	382,871	124,856	71,611	186,404
2. Percent first half of annual ton-miles (based on experience in most recent 4 years)	50.0	50.6	50.6	49.4
3. Estimated annual ton-miles (millions) (line 1÷ line 2)	765,000	247,000	141,000	377,000
4. Average revenue per ton-mile 2d and 3d quarters (X-267-B level) (cents)	1.597	1.825	1.466	1.503
5. Annual freight revenues (millions) 3 x line 4)	$12,241	$4,508	$2,067	$5,666
6. Yield of full surcharge (2.5 percent x line 5, less lumber adjustment)	299	112	52	135
7. Average percent of selective increases	4.0	4.1	3.5	4.1
8. Yield full selective increases (line 7 x line 5)	$489	$185	$72	$232
9. Adjusted yield surcharge (line 6 x 0.82	246	92	43	111
10. Adjusted yield of selected increases (line 8 x 0.82)	401	152	59	190

TABLE 2

Annualized	United States	Eastern district	Southern district	Western district
		Millions		
Yield of surcharge	$246	$92	$43	$111
Yield of selective increases	401	152	59	190
Total cost escalations	1,457	594	244	619

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These increases were anticipated to cover only 28 percent of the railroads' increased costs. Among such increased costs, the National Industrial Pollution Control Council reported that in 1969 and 1970, the railroads spent approximately $10 million a year to control and eliminate pollution; and that from 1968 to 1970, the railroads made capital improvements for environmental purposes costing $55 million. Furthermore, labor costs are expected to rise by $635 million in 1973, because of general raises accorded workers by new union contracts which provided for a 5-percent general raise on October 1, 1972, and a 25 cents-an-hour raise on April 1, 1973. Battelle concludes, and we strongly agree, that it is doubtful that the problems of the secondary commodities industry can be satisfactorily solved before the underlying problems of the railroad industry are remedied. The rails must move commodities at just and reasonable rates and should make a reasonable effort, wherever practicable, to promote the transportation of secondary materials. As we subsequently shall consider more fully, to direct them to do more would be to require the rail carriers to bear the environmental burdens of their customers. Many, if not most, of these carriers are financially incapable of assuming those burdens, and it is our statutory responsibility to preclude any course of action which might jeopardize the railroads' total ability and duty to serve the public. It is worthy to note at this point that the railroads estimate that approximately 70 percent of the $3 million a year additional revenues to be derived from these rate increases on recyclables would accrue to the Penn Central, Erie Lackawanna, and Reading, all of which are now in reorganization. Contrary to the position expressed in CEQ's poststatement comments, it appears that the financial well-being of the railroads is an important issue in this case.

A. Diversion From Rail to Truck—General

It is urged that the approval of all or part of the railroads' proposal selectively to increase their freight rates and charges will divert traffic to truck transportation and thereby further despoil the environment. This argument, in our judgment, is simplistic and speculative and we reject it. On this subject the following appears in the prior report (341 I.C.C. 321):

> It is true that the trend of traffic has been away from the railroads. During 1971, the class I line-haul railroads (railroads with annual operating revenues of $5 million or more) carried 5.9 percent fewer tons of revenue freight than during 1970, a decline

from 2,613.6 million tons to 2,458.6 million tons, and revenue ton-miles decreased 3.6 percent, from 762,544 million ton-miles to 739,391 ton-miles. Transport Economics, March-April 1972, page 7. The trend is more pronounced and of longer duration in terms of the railroads' share of the transportation market. In 1970, the railroads handled less than 40 percent of the total intercity ton-miles of freight transported by all modes of carriage, public and private, a decline of 7 percent from the 43-percent share of the market that the railroads enjoyed 10 years earlier, in 1960 (85th Annual Report, 1971, page 119; 79th Annual Report, 1965, page 141). In contrast, during that same period the truckers retained their share or about 22 percent of the transportation market, with an actual increase in ton-miles transported by them from 285 billion to 412 billion, an increase of 45 percent. *Id.* We do not think these marked shifts in traffic patterns fairly can be attributed to only the railroads' pricing policies.

Motor vehicle transportation long has been recognized as offering numerous inherent advantages over rail transportation. *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83 (1957). These include the speed, flexibility, and smaller cargo units peculiar to that mode, and the developments of the past decades in these areas have definitely favored truck transportation over rail transportation as a growing medium of intercity carriage. The truckers' ability to effect rapid deliveries has been vastly improved by the completion of much of the Interstate Highway System and the greater speeds that the vehicles operating over it are able safely to achieve and maintain. The unique ability of trucks promptly to perform door-to-door service has been closely related to the accelerated dispersal of industrial plants and commercial establishments into suburban and rural areas, often removed from rail lines. Finally, improvements in small containers and demountable truck bodies are infinitely more responsive to the needs of those shippers who do not ship in quantities sufficient to enable them to tender carloads of freight to the railroads.

By the same token, railroad service to some extent has been deficient. Our report in *Increased Freight Rates, 1970 and 1971, supra*, at 156, noted a number of areas in which shipper complaints had been numerous and where appreciable improvements were required, including particularly terminal delays, interchange delays, erratic delivery, and deliveries not reasonably timed or spaced. Similarly, our decision in *Investigation of Adequacy of Freight Car Ownership*, 335 I.C.C. 264 (1969), 335 I.C.C. 874 (1970), affirmed *United States* v. *Allegheny—Ludlum Steel Corp.*, 406 U.S. 742 (1972), called attention to the increasingly unsatisfactory performance of the railroads both in terms of car supply and their utilization. It goes without saying that shippers encountering poor

service on the rails naturally are inclined to explore the alternatives and inherent benefits offered by truck transportation.

The shippers' reliance upon rail service is thus a product of many factors, all of which combine to make up what the economists term the "demand" for rail service, and the shippers' ability or willingness to divert traffic to truck transportation is expressed in the "elasticity of demand" for such service.[4] The elasticity of demand for rail service varies, is considerably greater for some commodities than for others, and is more pronounced for shorter distances than for longer. By way of illustration, the long-haul rail transportation of livestock has all but disappeared and is now handled by truck, while that of fresh fruits and vegetables persists. On the other hand, the long-haul truck transportation of new automobiles has largely ended, having been recaptured by the rails, while that of cigarettes remains. No all-inclusive generalization is possible. See *Transportation of "Waste" Products for Reuse, supra,* at 106.

As noted in the prior report, grain and other agricultural commodities, perhaps more than any other category of freight, best exemplify the elasticity of shipper demand for railroad service. The "Big John" case of a few years ago, *Grain in Multiple-Car Shipments—River Crossings to So.*, 321 I.C.C. 582 (1963), noted the increasing participation of trucks and barges in grain movements to the South, a trend which has been no less pronounced in other parts of the country. *Grain Transportation in the North Central Region,* U.S. Department of Agriculture (1961). Such product appears to be particularly susceptible of diversion from the railroads because their transportation by motor carriers or, when transported in bulk, by water carriers is exempt from economic regulation by this Commission. Aided by technological advances in the vehicles and vessels they utilize and continuing improvements of the highways and waterways upon which they operate, the exempt truckers and bargelines have proved themselves to be forceful and effective competitors to the railroads in the transportation of grain and other agricultural commodities.

[4] "Elasticity of demand" generally indicates by how much demand will respond to a given percentage change in the final cost or price of goods or services. While estimates of relevant demand elasticities (otherwise referred to as price-sensitivity, price-quantity, or price-response studies) may be developed using sophisticated econometric and economic techniques, taking into account many factors including cross-elasticity effects, the data embodied in the railroad respondents' comments to the draft impact statement (see appendix D) abundantly demonstrate that the final price of iron and steel scrap, as well as the volume of its usage does not vary in proportion to the governing rail freight rates and that artificial and theoretical studies are not needed in this regard.

In the north-central region comprising North and South Dakota, Nebraska, Kansas, Minnesota, Iowa, Missouri, Illinois, Indiana, Michigan, and Ohio, the railroads' share of the non-Government grain shipped by country elevators declined from 1958 to 1963, from 68.3 percent to 57.1 percent, while that of the trucks increased from 30.3 percent to 40.8 percent. U.S. Department of Agriculture, *Changes in Transportation Used by Country Grain Elevators,* Marketing Research Report No. 724, 15 (1965). In the Northwest (Washington, Oregon, Idaho, Montana, and Wyoming), the grain delivered by rail at the terminal markets dropped from 78.8 percent in 1958-59, to 76.0 percent in 1961-62, while the barge receipts increased in that 4-year period from 10.6 percent to 14.6 percent and trucks changed very little, from 10.6 percent to 9.4 percent. U.S. Department of Agriculture, *Grain Transportation in the Northwest,* Economic Research Service Study 200, 31 (1964). In the Southwestern States (Arizona, Colorado, New Mexico, Oklahoma, and Texas), the railroads' participation in movements of all grains from both country and terminal elevators declined from 65 percent in 1960, to 50 percent in 1962, while the truckers correspondingly increased from 35 to 50 percent. U.S. Department of Agriculture, *Transportation of Grain in the Southwestern States by Rail and Truck 1960-62,* Statistical Bulletin No. 367, 16 and 26 (1966).

The railroads' response has been to cut their rates to meet the competition of the truckers and bargelines wherever and to whatever extent they can. Thus, as a practical matter, the exempt carriers for the past several years have set the rates for the movement of grain and other agricultural commodities. A study of the U.S. Department of Agriculture, *The Economics of Farm Products Transportation,* Marketing Research Report No. 843 (1969), confirms that, "[f]reight charges for traffic that is subject to active intermodal competition generally reflect the lowest rates at which truck or barge operations (singly or in combination) would be prepared to offer service." As that study explains:

> For-hire motor and barge operators, therefore, have generally taken the initiative in extending intermodal competition for farm products to more and more shippers in a widening range of locations. At any time, the outer geographic limit of service is set by truck or barge costs in relation to existing rail rates, and the extention of transportation alternatives to these limits brings pressure in turn on rail carriers who respond to the actual or proposed diversion of traffic by seeking—through regulatory channels—to reduce rates or improve service or both. The reduction typically brings rail rates about into line—on a service—equivalent basis—with the lowest rates at which competing carriers can offer service over the same or alternative routes. Once

such an adjustment has taken place, the specific sequence of challenge and response initiated by intensified truck or truck-barge competition is concluded. [Footnote omitted.]

Such intended competition makes it unlikely, we think, for the railroads to avail themselves of any authority here granted to increase the rates and charges upon grain and other agricultural commodities, or indeed on any commodities (including recycables), save to the extent that the level of competing truck and barge rates would enable them to do so without losing the traffic.

No less relevant to our inquiry into whether our actions herein may tend to divert traffic from the railroads is the extent to which other commodities may provide alternatives to those affected by the increases in the railroads' rates and charges. The sensitivity of demand for these materials—their demand elasticity—depends upon the degree of their suitability and/or complementary nature, the demand for the final product, and the technological constraints surrounding the production process. The cost of transportation may be only one of many variables operating in the marketplace, and simple historical observations can only serve as a crude guide to future possibilities.

No commodity of great importance to the railroads better reflects the interplay of the many and varied factors influencing its movement, only one of which is the level of railroad rates and charges, than does coal. This Commission frequently has noted the intense competition that utility coal encounters from other energy sources and the railroads have been encouraged to innovate reduced rates proposals to stem the threat of diversion. See *Coal to New York Harbor Area*, 311 I.C.C. 355 (1960); *Coal from Ky., Va., and W. Va. to Virginia*, 308 I.C.C. 99 (1959). The rising demand for low sulfur content fuels within recent years has introduced a further factor disrupting traditional patterns of coal movements by the railroads.

The movements of utility coal by the railroads are influenced only slightly, if at all, by our authorization of general rate increases. The commitments to use rail-transported coal are long range and virtually fixed and reflect a supplier's contract to deliver a certain quantity of coal of a specified quality over the life of the agreement in a plant with burners and other facilities dedicated to the use of such coal. The railroad connecting the mine to the powerplant is an integral part of the arrangement, as if it were a signatory to the agreement (which it in fact may be); and adjustments in the rates and charges for the rail haul involved, necessitated by intervening rising

labor and other costs, may be provided for by escalation clauses in no way dependent upon our authorization of general rate increases. As to this and similar traffic, we believe the fears of diversion of tonnages from the railroads as a result of the rate increases we approve herein are without foundation."

The level of the rail rates in relation to the level of the charges by truck, of course, is a factor entering into the determination of the demand for rail service. But to suggest that we should not authorize increases in the rates and charges of the railroads, compelled by rising labor and other costs, because of the diversionary effect of such action, assumes that the pressures of escalating costs have not fallen as heavily upon the truckers and that the truckers have been able to avoid increasing their rates and charges to the extent that the railroads have been forced to do. The facts as we know them support neither assumption.

We pointed out in the prior report that one "indicium of the rate increases that the truckers and the railroads have taken from 1960 to 1970 is the revenue per ton-mile that they have earned on their traffic" and we endeavored to make the following comparison (341 I.C.C. 324-5):

> For the railroads the revenue per ton-mile rose from 1.403 cents in 1960 to 1.428 cents in 1970, an increase of about 2 percent. The revenue per ton-mile for class I motor common carriers rose from 6.310 cents to 7.458 cents, or about 12 percent. Transport Economics, January-February 1972. The truckers have sought virtually semiannual increases in their rates and charges, and even as this investigation was in progress we permitted the rate bureaus representing about 85 percent of the regulated motor carriers of the Nation to publish increases ranging from 2 to 5 percent. These patterns scarcely suggest that the increases in railroad rates and charges have been the predominant cause of the diversion of traffic from the railroads to the trucks.

Assuming *arguendo,* however, that the increases in the railroads' rates and charges here approved will tend to divert traffic to truck transportation, it does not thereby follow that the environment will be further despoiled. The data on the relative polluting effects of train and truck operations are, at best, fragmentary and inconclusive.

We were obliged to consider the relative polluting effects of train and truck operations in F.D. 25896, *Bush Terminal R. Co. Abandonment* (nonprint), April 14, 1972. In our report on further consideration in that proceeding we concluded that the substitution of

"This belief is further borne out by the presentations of the railroad respondents and the Institute in their poststatement comments summarized in appendix D to this report.

truck service for the railroad operations sought to be abandoned would not significantly increase the level of air pollution in the affected area. In the *Bush* decision, we found that diesel trucks emit less carbon monoxide and nitrogem oxide per 1,000 gallons of fuel than diesel trains, with amounts being similar in the other pollutant categories.[18] The *Bush* decision was reviewed by the court and affirmed. *City of New York* v. *United States*, 344 F. Supp. 929 (E.D. N.Y. 1972). This court determined that this Commission had complied "with the letter of NEPA" and that we had "fully and in good faith considered all of the steps mandated by NEPA."

Battelle Columbus Laboratories in A *Study of the Environmental Impact of Projected Increases in Intercity Freight Traffic to Association of American Railroads* (1971), assumed that locomotive diesel engine emission characteristics are not substantially different from those of truck diesels, but estimated that trucks require the expenditure of four times as much energy, on the average, as railroads in moving a gross vehicle ton-mile.[19]

The American Trucking Associations, Inc., contends that the Battelle report entitled *A Study of the Environmental Impact of Projected Increases in Intercity Freight Traffic* proceeds on the basis of a number of unsound assumptions to a number of unwarranted conclusions and misuses data to exaggerate truck impact and understate rail impact. ATA states that Battelle ignores ton-

[18]This finding was based upon data derived from *Nationwide Inventory of Air Pollutant Emissions*, 1968, Publication No. AP-73 of the National Air Pollution Control Administration, U.S. Department of Health, Education and Welfare (1970), and confirmed by an EPA study, *Compilation of Air Pollutant Emission Factors*, Office of Air Programs Publication No. AP-42.

[19]For each net ton-mile of freight moved, according to Battelle, it is estimated that truck emissions are presently 3.7 times as high as those of railroad locomotives, and that this factor will increase to 4.6 by 1980, as a result of increasing truck speeds. This advantage for the railroads is a result of the lower rolling resistance of steel wheels on steel rails, as compared to pneumatic tires on pavement surfaces, and the economies of scale associated with longer trains.

Nationwide Emissions from Railroad and Trucks projected

	Total emissions 10 tons	Freight-hauled 10 ton-miles	Grams emitted per net ton-mile
Rails:			
1970	0.92	808	1.03
1980	1.15	1,140	0.91
Trucks:			
1970	1.74	419	3.76
1980	2.65	591	4.06

miles involved in movements to and from rail stations and involved in switching and terminal movements; that ton-miles is not a proper standard for measurement; and that Battelle ignored the competitive factors of pipeline and barge transportation. ATA avers that the Battelle study erred in assuming diesel truck and locomotive engines are the same and in comparing highway and rail construction and maintenance on a dollar basis.

As we stated in our prior report at page 326:

> Our conclusions as to the relative efficiencies of diesel-powered locomotive and diesel-powered trucks, the proponderant vehicles handling intercity freight, are more conservative than those of either of the foregoing studies. Relying upon the fuel consumption figures cited in the H.E.W. publication and our reported ton-mile data, we note that in 1968 the railroads transported 756,800 million ton-miles of intercity freight and consumed 3,810 million gallons of diesel fuel. That same year trucks handled 396,300 million ton-miles of intercity freight and consumed 5,350 million gallons of diesel fuel. Thus, we would calculate the relative greater ability of locomotives than trucks to transport ton-miles of freight per gallon of fuel consumed as being less than three to one.

However, the railroads must continue in existence for them to operate in the environmental interest of the public. To do this, they must have increased revenues to meet the obligations created by increased operational costs. Our analysis of the data we have available to us concerning the relative polluting effects of trains and trucks, coupled with our view that the increases we are authorizing in the rates and charges of the railroads will not appreciably divert traffic to the motor carriers, persuades us that our actions in this respect will not have a significant effect on the environment.

B. Rail Transportation of Recyclable Commodities

In this section we shall discuss the methodology employed in recycling different commodities, identify those problems that assertedly hinder recycling, evaluate the effects that the level of rail rates may have on such recycling, and determine whether the increased rail rates here approved are likely to have a significant adverse effect upon the quality of the human environment. We have divided this portion of our statement into sections relating to (a) recyclable commodities generally, (b) iron and steel recycling and transportation, (c) paper recycling and transportation, (d) textile waste, (e) petroleum refinery wastes and waste sulfides, (f) scrap glass, (g) nonferrous metal scrap, (h) plastics recycling and transportation, and (i) fly ash and other industrial ashes.

Recyclable commodities, generally.—The United States produces more than 4.3 billion tons of solid refuse a year. The following chart indicates the approximate proportion of recoverable resources being recycled.

Proportion of recoverable material resources currently being recycled

Material	Short tons available for recycling	Short tons recycled	Percent recycled
Aluminum	2,215,000	1,056,000	48
Copper	2,456,000	1,489,000	61
Lead	1,406,000	585,000	42
Zinc	1,271,000	182,000	14
Nickel	106,000	42,100	40
Steel	141,000,000	36,700,000	26
Stainless steel	429,000	378,000	88
Precious metals (troy ounces)	105,000,000	79,000,000	75
Paper	46,800,000	11,400,000	19
Textiles	4,700,000	800,000	17

Based on statistics and estimates provided by NASMI to Battelle Memorial Institute for Environmental Protection Agency Study.

The Department of Commerce states that the salvage industry (a term covering firms collecting and processing secondary materials) consisted in 1967 of 7,927 establishments, employing 79,000 people, and with total sales of $4.4 billion.[20] Of these establishments, 3,862 were primarily engaged in handling iron and steel scrap, and 4,075 handled nonferrous metals and other secondary materials. Iron and steel scrap accounted for almost half of the total sales, and copper scrap, about one-fifth.

Sales

Commodity	(000)	Percent of total
Iron and steel scrap	$2,166,940	48.7
Copper-base scrap	895,474	20.1
Wastepaper	378,019	8.5
Waste rags, textile waste, wiping clothes	316,377	7.1
Lead scrap	94,989	2.1
Zinc scrap	29,334	0.6
Other nonferrous metallic scrap	227,362	5.1
Other scrap and waste materials	111,358	2.5
Total	4,453,673	100.0

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The Department's figures show the trend in size of establishment has been towards larger firms. Of the total firms which operated the entire year, those with sale of $500,000 or more accounted for 12.1 percent in 1958, 17.6 percent in 1963, and 21.0 percent in 1967. Nevertheless, the industry is characterized by a large number of relatively small sellers, and a smaller number of relatively large buyers. The sellers, who deal in raw material substitutes, have minimal influence on prices and thus must accept the price offered by the purchaser. This price is basically determined by demand, which in turn is influenced by general economic conditions and the relative availability and cost of primary materials. Largely because of the nature of the buyer-seller relationships and changes in demand, secondary material prices exhibit a high degree of volatility, and fluctuate from day to day, week to week, or month to month. This is in sharp contrast to the relative stability prevailing in the market for the corresponding primary materials.

Prices of secondary materials are quoted in various ways. Depending on the commodity, the freight may be paid by the buyer or the seller. Where the seller pays the freight and there is an increase, he tends to protect his position by lowering the price which he is willing to pay to the collectors or other sources of the scrap. These sources, large in number and individually small in size, have little or no influence on the prices they receive. Admittedly, the low value of these discarded waste commodities means that the freight rates tend to represent a high percentage of their value. Nevertheless, we have been unable to find evidence that secondary commodities either are being diverted to other modes of transportation or are not moving as a result of past rail freight rate increases.

Chronological summation of general rail rate increases and their effect on current rates (rates in cents per hundred pounds)

THE FOLLOWING TABLE INDICATES THE BASIC RATES APPLIED TO RECYCABLE MATERIALS AS COMPARED TO VIRGIN MATERIALS

	Paper				
	Pulpwood		Scrap		
General increases	Ex parte increase per hundredweight	Average rate per hundredweight	Ex parte increase per hundredweight	Average rate per hundredweight	Net difference in rate
Average rates prior to Ex Parte No. 223	----------	17.4	----------	31.3	13.9
Ex Parte No. 223 (Oct. 24, 1960)	1/2 cent	17.9	1 cent	32.3	14.4
Ex Parte No. 256 (Aug. 19, 1967)	3 percent	18.6	3 percent	33.3	14.7
Ex Parte No. 259 (Nov. 28, 1968)	5 percent	19.5	5 percent	35.0	15.5
Ex Parte No. 262 (Nov. 18, 1969)	6 percent	20.7	6 percent	37.0	16.3
Ex Parte No. 265 (Nov. 20, 1970)	------do------	21.9	------do------	39.0	17.1
Ex Parte No. 267 (Nov. 12, 1971)	12 percent	24.4	11 percent	43.0	18.6

Differences in the rates governing the railroad movement of primary and secondary materials admittedly exist, as shown in the following chart, but it should be realized that (as shown earlier in this report) equity in freight rates among competing materials does not necessarily mean equal rates:[21]

[21]Appendix B contains a background of this Commission's proceedings dealing with the involved issues. See also the poststatement comments of the railroads and the Institue summarized in appendix E.

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Nonferrous metal					
Ores and concentrates			Scrap		
General increases	Ex parte increase per hundredweight	Average rate per hundredweight	Ex parte increase per hundredweight	Average rate per hundredweight	Net difference in rate
Average rates prior to Ex Parte No. 223	----------	51.7	----------	65.1	13.3
Ex Parte No. 223 (Oct. 24, 1960)	1/2 cent	52.2	1 cent	65.5	13.3
Ex Parte No. 256 (Aug. 19, 1967)	2 cents	53.3	3 percent	67.5	14.2
Ex Parte No. 259 (Nov. 28, 1968)	5 percent	55.0	5 percent	71.0	15.0
Ex Parte No. 262 (Nov. 18, 1969)	6 percent	59.0	6 percent	75.0	16.0
Ex Parte No. 265 (Nov. 20, 1970)	do	62.8	do	79.0	16.2
Ex Parte No. 267 (Nov. 12, 1971)	12 percent	70.3	11 percent	88.0	17.7

Note: Pulpwood: Converted from cords (4,500 pounds per cord) to hundredweight. Ores and concentrates: Converted from net tons to hundredweight. Scrap in hundredweight.

Source: Ores and concentrates—item 13750, tariff SWL 270-F nonferrous scrap—item 5400A. Tariff SW/W 2006-I pulpwood—item 6287.2, tariff T/D 754, Sup. 262, paper scrap—item 75660. Tariff TL-TCR-2009-H; increase tables—Ex Parte Nos. 223, 256, 259, 262, 265, and 267.

Notwithstanding the recent freight rate increases, the total volume of waste and scrap materials increased by 57,553 carloads between 1968 and 1969, and rail tonnage on all waste and scrap materials has risen from about 38 million tons in 1966, to 41.8 million tons in 1970. The lack of effect the recent increases have had on secondary materials movements is further emphasized by the fact that the volume of scrap materials shipped increased 7.29 percent between 1968 and 1969, while total traffic increased only 0.39 percent. The problem is not transportation or collection of these commodities, but rather the development of markets for recyclables, according to Fred Berman, President of the Institute of Scrap Iron and Steel. Dr. Hershel Cutler, Executive Director of the Institute, told a congressional subcommittee that the problem of recycling iron and steel scrap will not be solved until the steel industry states that it will buy more scrap. In a recent EPA study, *Analysis of Federal Programs Affecting Solid Waste Generation and Recycling*, this Commission was advised to grant preferential rate increases or rate holddowns for secondary materials if we determine

that recovery of such materials will *significantly* increase due to freight rate adjustments. [Emphasis supplied.] GSA's poststatement comments repeat this advice. We have found no basis for reaching such a conclusion in this proceeding.

Iron and steel—recycling and transportation.—Perhaps the most controversial of the recyclable commodities here before us, iron and steel scrap, represents the most available and greatest revenue-producing recyclable commodity. In order better to understand the unique problems relating to the transportation of iron and steel scrap for the purposes of recycling, we will first discuss the steelmaking industry, steelmaking technology, iron and steel foundries, the scrap industry structure, and ferrous scrap technology, before evaluating the effects that the proposed rail rate increases are likely to have on the movements of these commodities for the purposes of recycling.

a. *Steelmaking industry.*—The iron and steel industry is comprised of four basic components: Operators of integrated steel mills, nonintegrated steel mills, steel foundries, and iron foundries. Integrated steel mills operate blast furnaces in which iron ore is transformed to hot metal or pig iron, steel furnaces in which the hot metal or pig iron is alloyed into steel, and rolling mills which produce intermediate products, bars, and sheets of various shapes and sizes of alloyed steel for further processing by manufacturers. The four largest steel companies—U.S. Steel, Bethlehem, Republic, and Armco—are operators of integrated steel mills, for the most part, and produce over 50 percent of all steel manufactured in the United States. Although there are no statistics available which directly measure the output of integrated steel mills as compared with nonintegrated mills, the bulk of all steel is produced in integrated mills. Integrated mills usually operate several open-hearth or basic oxygen steel furnaces (BOF) in conjunction with a blast furnace, converting iron ore and other raw materials into steel at the same site. Nonintegrated steel mills have steel furnaces but do not have blast furnaces; hence, they buy either scrap or pig iron for conversion into steel. Nonintegrated steel mills usually use electric furnaces rather than basic oxygen or open-hearth furnaces to make steel. In recent years there has been rapid growth in small, electric furnace-equipped nonintegrated mills. These "mini-mills" are located throughout the country and, as of January 1971, there were 43 in operation in the United States, producing about 5 percent of total steel production.

Steel foundries manufacture steel castings by melting steel scrap in furnaces similar to the electric steelmaking furnace and molding the steel into the shape desired. Iron foundries buy pig iron and scrap to make iron castings, usually employing cupola furnaces. Most of the products of the steel industry are sold to other industries for further processing before reaching the hands of private, commercial, and industrial consumers. The buyers of the largest quantities of steel are the transportation and construction industries, who utilized over 40 percent of total steel production in 1967. See Arsen Darnay and William Franklin, *Economic Study of Salvage Markets for Commodities Entering the Solid Waste Stream*, for EPA, Midwest Research Institute, p. 5-11 (December 1970). This study concludes that the collection of ferrous scrap, which occurs in dispersed locations, and the removal of impurities, such as tin, are more costly than mining and processing ores. Castings are normally sold to other manufacturers.

The Bureau of Mines reports that the consumption of scrap and pig iron decreased in 1970, because of a general economic decline. In 1969, 94,816 (thousand short tons) of scrap were consumed and 94,635 of pig iron; and in 1970, 85,559 of scrap and 90,126 of pig iron. Battelle studies show that in 1966, almost 77 percent of companies shipping scrap iron and steel used rail service while more than 78 percent employed such service in 1971. The transportation of raw materials by percentage of firms using rail service was relatively constant during this same period.

Scrap iron prices rose from $27.64 a ton in 1967, to $47.50 a ton in 1970, without comparable price changes in iron ore or pig iron, although all were subject to general rate increases. The total consumption of iron and steel scrap increased from 73.5 million tons in 1957, to 94.8 million tons in 1969. It is predicted that United States scrap consumption for steelmaking will rise 20 million tons in the 1970's. It should be noted that increases in rates on iron ore will result in $9.4 million in revenues a year for the railroads, while adoption of the approved rates for scrap iron and steel will result in $5.6 million a year. For integrated mills, where both ore and scrap are consumed in the manufacture of the metal, the consumption and demand for scrap are largely dependent on the costs of producing the metal from ore. In this regard, despite changes in iron and steelmaking technology, prices of materials, and transportation costs, the amount of scrap in the total furnace charge has remained constant for almost 30 years, accounting for about 50 percent of the iron content in the products.

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Taking the abandoned junk automobiles as an example, it has been shown that the real breakthrough there has been a technological one. The development of the auto shredder, which produces a high quality scrap with few contaminants, has encouraged steel mills and foundries to make increased use of such shredded scrap. The major remaining problem in the junk car disposal area is the removal of legal barriers concerning title to the abandoned car. The Department of Interior concludes that "it is doubtful whether a significantly faster rate of junk car disposal would have occurred without these two events, regardless of the freight rate on ferrous scrap or on the junk car bulk."

It is also pointed out that the scrap storage sites at steel mills are relatively inaccessible to trucks, and thus the use of motor carriage may not always be possible without changes at the mills. In this light, diversion of traffic to motor transportation seems unlikely.

b. *Steelmaking technology.*—Steelmaking begins with the mining of iron ore, coal, and limestone. Iron mined in the United States is either low-grade ore or taconite (iron in siliceous form, usually lower grade), and virtually all domestic ore is beneficiated to increase the iron content before shipment. In 1971, one-third of the ore consumed in the United States was from foreign sources. Much of the foreign ore is naturally high grade and does not need to be beneficiated. Coal is also processed before use. Coal is purified in "coke ovens," which are usually located at the steel mill.

Raw materials are transported to blast furnaces, where the ore is transformed into hot metal or pig iron. The Bureau of Mines describes the smelting process[22] as follows:

> The chemistry of the blast furnace is extemely complex. At least 12 principal chemical reactions are possible, but simply stated the furnace performs only two functions: (1) It reduces iron oxide to metal, and (2) it fuses and liquefies the charge so that metal and slag will separate. Coke is the standard fuel and reductant, and limestone and/or dolomite are the fluxes. [p. 295].

The hot metal produced by the blast furnace can be either transferred to a steel furnace at the same site, as at an integrated mill, or transported while still hot to a steel furnace nearby, or allowed to cool into pig iron.

The next step in the making of steel is the alloying and purification of the hot pig iron or steel scrap. There are three major types of steel furnaces used today: the basic oxygen furnaces (BOF), which produced 63,943,000 net tons in 1971; the open-hearth furnaces,

[22] Bureau of Mines, *Mineral Facts and Problems*, 1970.

which produced 35,559,000 net tons; and the electric-arc furnaces which produced 20,941,000 net tons.[23] Although their input requirements and economies may differ the several steelmaking processes are fundamentally identical:

> In simplest terms, steelmaking may be described as a purifying and mixing process that takes place in a molten mass. Molten iron mixed (alloyed) with carbon is treated to remove part of the carbon and other deleterious materials to form basic steel. Other elements or alloys may be added to contribute to the pysical or chemical properties of the solid product (steel). The proportions of these additives, including carbon, as well as treating methods are critical and determinative of steel produced.[24]

The basic oxygen furnace (BOF) has proliferated recently to the point where it has largely taken the place of the open-hearth furnace in integrated steel mills. Its principal advantage is that it requires less than an hour to heat as charge, while it takes 10 hours for the open-hearth. Battelle estimates that 60 percent of all raw steel will be produced by this process in 1985. As with all steel furnaces, part of the BOF charge is hot metal and part is scrap. For technical reasons, normally only 30 percent of the charge can be scrap. Spills of molten iron and steel, cuttings, scrapings, and trimmings of products before shipment usually produce enough "home scrap"[25] to supply the scrap portion of the BOF charge. It is possible to increase slightly the proportion of scrap in the charge by preheating the scrap before it enters the furnace, as some companies are now doing. A variation of the BOF furnace, the "Q-BOP," will be able to use 20 percent more scrap in its charge, for a total of 36 percent. U.S. Steel is now building Q-BOP plants in Indiana and Alabama, but otherwise this variation of BOF is not presently in use in the United States.

The open-hearth furnace stood as the major producer of steel for 60 years but was surpassed in steelmaking output in 1970 by the

[23] American Iron and Steel Institute, *Annual Statistical Report, 1971*, p. 40.
[24] Burea of Mines, *ibid.*, p. 295.
[25] Scrap is classified according to source. There are two major classifications: home scrap and purchased scrap. Home scrap is generated within the steel mills and foundries of the industry and comes from molten iron and steel spills and cuttings. It is reused within the mill. Purchased scrap is, as the name implies, scrap which is bought, not produced within the mill. Purchased scrap is further broken down into prompt industrial and obsolete scrap. Prompt industrial is produced as a waste byproduct of the iron and steel fabricating industry. Items such as webbing from punched presses, cuttings from auto body manufacturers, and discorded pieces from construction make up this category. Obsolete scrap comes from finished products which are no longer useful and whose only remaining value lies in the salvage of their iron and steel for reprocessing. Typical items which fall into this category are: machinery, rails and railroad equipment, construction equipment, and old automobile bodies.

BOF. Battelle estimates that by 1985, the open-hearth will account for only 10 percent of steel output. There are virtually no open-hearth furnace being built today. The open-hearth has the ability to use from 29 percent to 100 percent scrap; typically it uses 50 percent. Sixty percent of the scrap used is home scrap, and 40 percent is purchased and brought into the mill. It appears that open-hearth furnaces will continue to operate for some time, but their contribution to raw steel output will decline.

The electric-arc furnace has grown steadily in importance over the past two decades, as its share of steel production has increased from 7.1 percent in 1957, to 17.4 percent in 1971. Battelle estimates that electric-arc furnaces will account for 30 percent of all raw steel produced by 1985. New electric furnaces are continuing to be built. In fact, the whole concept of the rapidly expanding mini-mill is based on the ability of the electric furnace to operate profitably on a small scale. The electric furnace can use either pig iron or scrap in its charge. However, because scrap is much cheaper than pig iron (No. 1 heavy melting scrap has been selling for less than half the price of pig iron), electric furnaces use about as much scrap as they can. Although electric furnaces can use up to 100-percent scrap, present consumption runs about 98-percent scrap, 2-percent pig iron. Home scrap accounts for about 30 percent of the total scrap used by electric-arc furnaces; the rest is purchased.

In steelmaking, either raw materials, a combination of raw materials and scrap iron and steel, or scrap may be used as the basic inputs. However, scrap and ore do not enter the steelmaking process at the same point, and are not in that sense interchangeable from a technological standpoint. Iron ore normally must be smelted into "hot metal" (molten pig iron) in a blast furnace before entering a steel furnace.[36] Scrap is put directly into the steel furnace, entering the process at the same point as, and competing with, pig iron, where such is used.

[36]Some attempts at using concentrated prereduced iron ores in steel furnaces have been made. The Bureau of Mines states in its *Mineral Facts and Problems*, 1970: Direct smelting of iron ore to hot metal in an electric furnace has been practiced on a limited scale in European countries such as Norway where the relative cost of electric power is low. The use of the electric furnace to melt and refine high-grade prereduced agglomerates is expected to increase where there is a demand for the production of iron or steel in limited quantities, in areas of intermittent use, and for special purposes.

Processes to convert ore directly to iron and steel are available but have not progressed beyond the pilot plant state. [p. 295].

c. *Iron and steel foundries.*—Iron and steel foundries do not have blast furnaces. In 1971, foundries shipped 1,582,883 short tons of steel castings. This was not a significant change from the level of the previous 7 years.[27] The type of furnace used by steel casting manufacturers does not differ significantly from the steelmaker's electric-arc furnace. Virtually the entire furnace charge is scrap.

The output of iron foundries has also remained about the same since 1964. Shipments of gray iron castings were down slightly in 1971 to 13,838,713 short tons from their all-time high of 15,935,043 short tons in 1969. Most iron foundries have cupola furnaces. The cupola furnace uses either cold pig iron or iron and steel scrap in its charge. Typically, a mixture of scrap and pig iron is used. Steel scrap can be used only in limited quantities, with iron scrap being the major input, although the newer furnaces allow a higher proportion of steel scrap to be used. Scrap is favored over pig iron, again because of the lower price of scrap. In 1970, cupola furnaces used 86-percent scrap and 14-percent pig iron in their charges.[28]

d. *Scrap industry structure.*—There are three major functional groups in the iron and steel scrap industry. The first group collects scrap materials and is comprised of small entrepreneurs who scavenge the countryside looking for salable waste material, and civic groups who organize and run recycling drives (usually collecting steel cans). The obsolete scrap collected is trucked either to junk yards for sorting and assembling or directly to the next major group, the scrap metal processor. There were about 1,800 of these processors in 1966,[29] located throughout the country but clustered around large urban areas. Processors are the core of the scrap industry, and deal primarily with obsolete scrap. See footnote 20, *supra.* Processors receive scrap from collectors, junkyards, and auto wreckers who obtain cars for their spare parts value and then sell the hulks to processors for the purpose of getting rid of them. The processors bundle, shred, or otherwise prepare the scrap for consumption by steel mills. They may have direct selling arrangements with particular steel companies, be owned by steel companies, or work through brokers. Brokers comprise the third group in the ferrous scrap industry. In 1966, there were about 200 brokers, three-quarters of which were both processors and brokers.

[27] *Metal Statistics*, 1972, Fairchild Publications, Inc., p. 253.
[28] Bureau of Mines, *Yearbook, 1970*, p. 9.
[29] Business and Defense Services Administration, U.S. Department of Commerce, "Iron and Steel Consumption Problems," 1966, p. 3.

Brokers usually have contracts with steel companies, agreeing to provide certain quantities of the various types of iron and steel scrap. Using their own processing facilities and purchasing scrap from other processors, the brokers arrange the delivery of large quantities of obsolete scrap to the steel mills. Brokers also arrange many of the prompt industrial scrap shipments from the fabricators back to the steel mills. A broker may not actually see or handle the scrap he deals with, and this is particularly true for the prompt scrap which is usually shipped directly from the fabricator back to the steel mills. Frequently, however, when steel is sold to a large-scale fabricator, there is an agreement between the fabricator and the mill to return the scrap directly back to the mill with no midlle man. Whitten (see *Bibliography*) contends that the cost of transporting scrap iron and steel can be significantly reduced by increasing the average load per car and utilizing the railroads' incentive rates. This can be accomplished through the use of brokers, shipping associations, or freight forwarders.

The industry has adopted somewhat of a double standard regarding the rail transportation of scrap iron and steel. This standard was best enunicated by Ray Freedman, Vice President of Commercial Metals, who stated that recycling would rise if rail rates were lower and the railroads had more available cars. He did not explain how the railroads are supposed to finance their new car purchases. This scrap almost exclusively moves by gondola cars. This class of railcar declined in total numbers from 294,202 in 1955, to 192,238 in 1970, a 35-percent decrease. Obviously, it is expected that the railroads could raise rates on "the other guy's" traffic. Unfortunately, this proceeding has found the finger pointing in every direction except inward.

e. *Ferrous scrap technology.*—Of the three classifications of scrap, only obsolete scrap has a technology which is independent of other industries. Home scrap never leaves the steel mill and is completely contained within the steelmaking process. This scrap is necessarily generated by the mill and is always used within the mill itself. Different furnaces generate somewhat different proportions of home scrap as discussed previously. The major technological consideration concerning home scrap is the increased use of the continuous-casting method by steel companies. Continuous casting eliminates the need to cast steel into ingots, then cool and finally reheat the ingots for rolling. Continuous casting can eliminate as much as half of the home scrap generated and is increasing in use.

As more steel is manufactured using this method, the need to go outside the mill and buy scrap will increase. Continuous casting is an attractive investment and will be used more as new mills are built. The extent of its future expansion is subject to much conjecture, but the most conservative estimate puts continuous casting as taking part in 20 percent of all raw steel production by 1985.

Just as the technology of home scrap is primarily dependent on its source (the steel mills), the available quantity and quality of prompt industrial scrap are dependent on the technology of the fabricator. The amount of prompt scrap depends on the manufacturer's efficiency in fabricating the final goods from the mill's intermediate steel product. Prompt scrap, like home scrap, is captive within the industry. Unlike home scrap, prompt scrap is transported back to the steel mill in the form of scrap. Prompt scrap is a fairly homogenous product with known characteristics and composition which make it a highly sought form of scrap. The relevant technology for prompt scrap is indirectly derived from the fabricating industry, the steelmaking industry, and the transportation industry.

Obsolete scrap is the only form of scrap which truly has an industry having technological considerations independent of other industries. Prompt and home scrap have neither major collection problems nor processing needs which are not served within other industries. The broker may buy prompt industrial scrap, but prompt scrap is normally in a form which is directly usable by steel mills and is concentrated at a point where it can be easily transported. Obsolete scrap frequently does not have these desirable characteristics. This scrap comes from iron and steel products which have entered the inventory of products in use and which in an extremely variable amount of time, have been discarded. These obsolete scrap products must be gathered from diverse sources and then processed into forms which can be used by steel and foundry companies. This gathering, processing, and shipping of scrap iron and steel constitute the heart of the scrap industry.

As we have discussed, pig iron and scrap are similar in ferrous content and can be substituted for each other to a significant degree. Scrap is an alternative, for example, for hot metal or pig iron smelted from iron ore. Thus, the average amount of raw material inputs per ton of pig iron produced in a given year will yield the actual metallurgical equivalency of scrap to its substitutable raw materials.[10] The 1971 Annual Report of the American Iron and Steel

[10] I.e., "x" tons of raw materials = 1 ton of pig iron = 1 ton of scrap.

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Institute[31] indicates that the raw materials needed to make one ton of pig iron in 1971 were:

	Net tons
Iron ore and agglomerates	1.585
Scrap	0.033
Mill cinder, scale, et cetera	0.057
Limestone and dolomite	0.242
Coke	0.627

These proportions have remained stable at least since 1962. This equation compares to one worked out by the Institute of Scrap Iron and Steel which gives the equivalency as: 1.5 tons iron ore + 1 ton coke + 0.5 ton limestone = 1 ton scrap.[32]

In 1971, blast furnaces used in the production of pig iron: 194,568,000 gallons of fuel oil, 17,182,000 gallons of tar and pitch, 37,337 million cubic feet of natural gas, 10,072 million cubic feet of coke over gas, 1,512,088,000 cubic feet of blast furnace gas, and 207,289 million cubic feet of oxygen.[33]

However, scrap must be molten as a part of the steelmaking process. Because most pig iron goes into the steel furnace in molten form, the fuel inputs are left out of the equation in order to approximate the additional cost of melting cold scrap into a form competitive with hot metal.

In order to measure the effect of a change in transportation rates, the basic equivalency formula must be modified somewhat to reflect accurately the goods being transported. First, scrap iron used in the blast furnace usually comes from home scrap. Home scrap is not transported and should be deleted from the equation. Second, mill cinder, scale, et cetera, also originates at the steel mill and is not transported. This component should also be withdrawn from the formula. Third, coke is usually not transported. Instead, coking coal is moved to the integrated steel mill where a coke oven converts the coal to coke. Coal is the raw material which is transported to the blast furnace area. In 1971, it took an average of 1.454 tons of coking coal to produce 1 ton of coke.[34] In order to compare the actual raw materials transported with the scrap transported, it is

[31] American Iron and Steel Institute, *Annual Statistical Report*, 1971, p. 50.
[32] The Institute of Scrap Iron & Steel, "Scrap is a Resource of Our Nation," p. 2.
[33] *Ibid.*, pp. 49 and 51.
[34] *Ibid.*, pp. 53-54.

necessary to substitute coal for coke in the equation.[35] The 0.627 ton of coking coal should be multiplied by 1.454 and the product (the tons of coal per 0.627 ton of coke) substituted for coke in the equation. The product, 0.912 ton of coal, is the amount of coal transported to the coke oven per ton of pig iron. Thus, the calculated 1971 equivalency is: 1 ton of scrap iron and steel = 1.585 tons of iron ore and agglomerates + 0.242 ton limestone and dolomite + 0.912 ton of coal. This equation differs from that developed by Mr. T. M. Barnes (Battelle Memorial Institute) in two major ways: First, Mr. Barnes does not include limestone in his equation. Limestone is a necessary ingredient in making pig iron as has been pointed out in the above quote from the Bureau of Mines. The American Iron and Steel Institute lists limestone and dolomite along with coke as a primary ingredient in the production of pig iron (AISI *Annual Statistical Report*, 1971, p. 50). There is little doubt that this should be included in the equation. Second, the volume of coal Mr. Barnes uses in his equation is a third of what is actually required on the average, according to the American Iron and Steel Institute.

From the equation above, we can estimate the rail transportation cost of 1 ton of scrap and of its comparable raw materials. The cost to the shippers of moving their inputs to the steel mills by rail can be measured on an average revenue per ton basis. Average revenue per ton divides the sum of the revenues by the total tons shipped in order to determine a rate indicative of the average move. Revenue per ton for particular movements will differ from the average, but the average more adequately describes the aggregate rate characteristics.[36] In terms of the inputs to steelmaking, the use of average revenue per ton as the measure of rail transportation cost involves several related assumption: it assumes that all inputs receive a rail movement;[37] it assumes that the average load and distance moved are representative for each commodity; and it assumes that a receiving mill is located at the point where the average movements converge.

The average revenue per ton, when applied to the corresponding weight of the input material required per ton of pig iron, gives the

[35]Computations which take coke as the transported goods have also been made. In this case it is assumed that the steel company buys its coke from processors and transports it to the mill. As stated above, transporting the coal to mill is the usual method employed by steel companies.

[36]Dr. Hershel Cutler of the Institute of Scrap Iron and Steel (statement of March 30, 1972) and Mr. T. M. Barnes of Battelle Institute (V.S. No. 335-a) use average revenue per ton as a measure of rail rates. See appendix C.

[37]In general, steel mills will accept only raw material inputs by rail.

average rail line-haul transportation cost for that input. These transportation costs are summed to give the total transportation cost for all the raw material inputs. This total can then be compared with the transportation cost of scrap (average revenue per ton) to determine the extent of the cost difference. By applying the proposed rate increases to the transportation costs of these commodities, the effect of the proposed rate increase on the total rail transportation costs can be estimated.

The major problem in calculating the effect of Ex Parte No. 281 proposed rate increases is the lack of current rate data. In order to obtain an average revenue per ton by commodity, it is necessary to go to the 1969, Carload Waybill Statistics,[34] and update the average revenue per ton figures[35] by applying the subsequent rate increases in Ex Parte No. 262 and Ex Parte No. 265. In both, Ex Parte Nos. 262 and 265, the line-haul rate increases were 6 percent across the board. Therefore, in the procedure used to develop the figures in the table below, the 1969 average revenue per ton-mile is multiplied by 1.06 and by 1.06 again to account for Ex Parte Nos. 262 and 265 increases.

In Ex Parte No. 267 the problem is more complex because the increase was selective by region and commodity. Thus, the revenue per ton for each commodity is determined by regional moves and each regional "rate" is multiplied by the appropriate percent increase in Ex Parte No. 267. These rates are then weighted by the proportion of traffic each regional move category accounted for in 1969 (measured by tons) and added to produce the composite average rate for that commodity. The rate, after the addition of Ex Parte No. 267 increases, is an approximation of the average revenue

[34]Department of Transportation, *Carload Waybill Statistics*, 1969, statement TD-1, April 1972.

[35]This process actually understates the average revenue per ton of iron ore and agglomerates moving from the Mesabi range to steel mills in Pennsylvania (Pittsburgh, et cetera) and in Ohio. The majority of domestically produced ore travels from the Mesabi to Duluth by rail. There it is shipped by water in deep-draft vessels to southern ports on Lake Erie. The ore is then unloaded and either used by steel mills on the lake or shipped again by rail to inland steel mills. Each one of these two movements has a waybill and is counted as a different shipment. However, it is the same ton of ore. Thus, the same ton of ore has been counted twice while, in reality, moving only once to the steel mill. As a consequence, the average revenue per ton is significantly lowered by, in effect, taking the total revenue per ton of this single ore shipment and dividing it by two.

In addition, the Department of Transportation subsampled iron ore and agglomerates (1011) in the 1969 report. The subsample may have affected the average revenue per ton of this commodity. Even if the average revenue per ton indicated by the sample is overstated significantly, it is not believed that it would materially affect the finding of higher average revenue per ton of scrap than equivalent raw materials.

per ton rate in effect currently.[40] The Ex Parte No. 281 selective increas is implemented in the same way as Ex Parte No. 267, multip ing the commodity regional move rates by their scheduled increas s. The products are multiplied by the proportion of the commo lity's traffic which each regional move accounted for in 1969. T he regional products for each commodity are again added to the co posite commodity rate.

The calculation of the transportation cost for one ton of scrap and the equivalent amount of raw materials is accomplished by multipl ing the appropriate weight per ton of pig iron for each commo lity by its applicable charge per ton. The transportation costs o the raw materials are then added and compared with the transpo tation cost of scrap. The shipping cost per ton of scrap without the Ex Parte No. 281 rate increase is $5.58, while the total transpo tation cost of the equivalent amount of raw materials is $8.49.[41] With the present rate structure, it costs $2.91 less to ship scrap t an the comparable raw materials. With the implementation of Ex arte No. 281, the average cost of transporting 1 ton of scrap w ll be $5.83, and the cost of transporting the comparable raw materia s will be $8.87. Thus, shippers would need to pay $3.04 more to transport raw materials than the corresponding amount of scrap. T his difference is based on the actual 1971 average equiva- lency a d the most recent available revenue per ton data. The differen e in transportation costs of raw materials and scrap will increase with Ex Parte No. 281, favoring scrap by an additional 13 to 16 cent

Transportation cost of scrap** and comparable raw materials****

	1966	1969	Present	With Ex Parte No. 281
Raw mater				
With coki ls:				
With coke coal	$5.72	$6.67	$8.49	$8.87
Scrap	5.80	7.15	8.62	9.03
Difference:	4.12	4.50	5.58	5.83
With coki				
With coke coal	1.60	2.17	2.91	3.04
	1.68	2.65	3.04	3.20

*Average revenue per ton.

**One to of scrap iron or steel.

***Raw aterials required to produce 1 ton of pig iron.

[40]This pr edure assumes each commodity's division of traffic by regional move category is the same today in 1969, and that the general traffic patterns have not changed significantly. It also assumes th the railroads have taken rate increases when they have been granted and that the commod minimum rates have not had a significant effect on the average revenue per ton of [41]Or $9.4 ities in question.

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A recent study prepared for the Council on the Environment of New York City, addressing the growing problem of garbage disposal faced by that city, was reported in *The New York Times* of February 11, 1973, to have stated:

> The section on metal reclamation, written by Stephen Cheikes, says that most offers by steel companies to buy ferrous scrap iron from municipal waste are motivated by "public-relations considerations in the steel industry."
>
> "Obviously," Mr. Cheikes says, "the well-publicized environmental movement has penetrated the walls of the large steel corporations" and they are concerned about their products, such as tin cans, ending up as litter.
>
> But, he says, most of the ferrous metal is so contaminated when it ends up as garbage that it is virtually worthless.

Paper—recycling and transportation.—"Paper is one of the major manufactured materials consumed in the United States and the largest single component of municipal waste."[42] The United States produces about 58.3 million tons of paper a year which in 1967, comprised 42 percent (47 million tons) of all residential and commercial waste.[43] Over the decade of the 1960's, paper consumption increased by 4 percent annually and it is expected to reach a total of 85 million tons by 1980.[44] In 1969, 19.8 percent of all fibrous raw materials inputs in the paper industry consisted of waste paper from industrial, commercial, and residential sources.[45] As it appears that much higher levels of paper recycling are technologically feasible, it is relevant to consider these factors which are, in fact, constraining increased recycling.

Wastepaper dealers and processors gather wastepaper from paper converters (such as envelope manufacturers and printers) and residential and commercial sources under a variety of arrangements ranging from exclusive contracts from the collection of high-grade conversion waste to the informal buying of newspapers at the processing plant which have been collected by civic organizations and others. After the paper has been collected, it must first be segregated into the five general categories of wastepaper and then sorted to remove any contaminants or unacceptable items.[46] Following the segregating and sorting operations the paper may be baled directly or after shredding or "hogging" (to increase density).

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[42] Arsen Darnay and William Franklin, *Economic Study of Salvage Markets for Commodities Entering the Solid Waste Stream* (for EPA), Midwest Research Institute, December 1970, p. 4-1.
[43] *Ibid.*, p. 4-6.
[44] *Ibid.*, p. 4-2.
[45] *Loc. cit.*
[46] *Loc. cit.*

High-density baling equipment compresses the paper to a density of 17 to 25 pounds per cubic foot.[47] Baling, shredding, and hogging equipment are the most recent significant additions to wastepaper processing technology. Their application improves the handling characteristics of the wastepaper and has been responsible for effectively minimizing paperstock shipping costs.

"Paperstock" is wastepaper which has been collected, sorted, and graded to meet the specifications of consuming industries. There are five general categories of paperstock: mixed papers, news, corrugated, high-grade pulp substitutes, and high-grade deinking paperstock. The mixed, news, and corrugated grades are often designated as "bulk grades." The two remaining grades are simply designated "high-grade" paperstock.[48]

Paperstock is usually purchased by manufacturers at an "f.o.b. dealer's shipping point" price;[49] and thus the purchaser assumes the burden of transportation costs. Once the paperstock is received at the mill, it is used as a raw material in the same way as woodpulp. The fibers are separated from the original product by mechanical agitation in a water slurry. Other treatments, such as deinking or contaminant removal, may follow this process. The greatest increase in paperstock use in recent years has resulted from the development of a process for the deinking of newsprint for reuse.[50] While paperstock may be used in the production of almost any type of paper, only 6 percent is used to produce the same grade of paper as that from which it originated. The bulk of paperstock is used in the production of lower grades of paper and paperboard.

"Home scrap" is produced and reused within the originating paper mill. See footnote 25, *supra*. The paper industry, however, does not recognize home scrap in its data; and it is not included in any industry figures.[51] Apparently home scrap is run back through the production process without special processing.

Prompt industrial scrap is generally called "conversion waste" in the paper industry and is composed of trimmings and waste resulting from the conversion of bulk paper products into finished products, such as envelopes, books, note paper, paperboard boxes, et cetera. Conversion waste is high quality because of its purity, consistency,

[47] *Study to Identify Opportunities for Increased Solid Waste Utilization—Paper* (draft copy for National Association of Secondary Materials Industries), Battelle Memorial Institute, June 1972, p. 65.

[48] *Ibid.*, pp. vii and 15.

[49] "Paper Stock Prices Per Ton," *Official Board Markets*, April 22, 1972, p. 9.

[50] Battelle Memorial Institute, *op. cit.*, pp. 94-95.

[51] Darney and Franklin, *op. cit.*, p. 4-3.

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density, and fiber strength. Conversion wastes require very little processing, and large portions are used directly as pulp substitutes. The supply of conversion wastes from converting plants is generally steady and reliable, but prices vary widely, depending upon the type of scrap involved. Currently, prices in New York range from $57.50 per ton for Number 1 hard white envelope cuttings to $17.50 per ton for jute corrugated cuts.[52] In 1971, the price for all paper scrap items was 32 percent below that of 1966, in comparison to increases in freight rates of 31 percent.

"Obsolete" paper scrap, or waste in the form of corrugated boxes, newspapers, and used office papers, is the source of 60 percent of all paperstock.[53] Approximately 40 percent of the obsolete wastepaper recovered is from the residential sector, with the remaining 60 percent contributed by commercial (nonconverting) enterprises. This obsolete wastepaper usually is sorted into four grades: Number 1 mixed, Number 1 news, Number 1 office waste, or old corrugated containers.[54] Prices in New York range from $1-$2 per ton for Number 1 office waste to $20-$22 per ton for Number 1 news.[55]

The principal sources of obsolete wastepaper and conversion wastes are the East North Central and Middle Atlantic States.[56] These areas contain numerous large population centers, where wastepaper is generated and papermill outputs are consumed, as well as enough wastepaper dealers of sufficient size to collect, process, and market the supply of wastepaper. The dealer-processors tend to cluster around mills which consume mixed paper, news, and old corrugated containers to minimize freight costs on these low-quality low-value grades, and the mills using these grades of paperstock generally locate near the population centers with their large supplies of wastepaper in order to minimize the delivered costs of their "raw materials."[57]

The economics of wastepaper processing by dealer-processors is not easily generalized. Wastepaper is received or collected from its generators under a wide variety of arrangements. While practically all recovered wastepaper is transported from generator to dealer-processor by motor carrier, the ownership of those carriers may vary from case to case. In some instances, generators haul their

[52] "Paper Mill Supplies," *Fibre Market News*, July 24, 1972, p. 4.
[53] Darnay and Franklin, *op. cit.*, p. 4-47.
[54] *Loc. cit.*
[55] "Paper Mill Supplies," *Fibre Market News*, July 24, 1972, p. 4.
[56] Darnay and Franklin, *op. cit.*, p. 4-21.
[57] Battelle Memorial Institute, *op. cit.*, p. 48.

wastepaper to the site of the dealer-processor's operations; in others, the dealer-processor collects his clients' wastepaper with his own trucks; in others, common or contract carriers move wastepaper from generators to the dealer's processing site (often on backhauls). Trucks used by generators or dealer-processors are often those which are no longer suitable for long hauls, and the transportation is rendered at relatively low variable costs.[58] Wastes from paper-converting operations are often segregated into types and baled at the source. The bales are not only more dense, but are cleaner and easier to handle than unsorted bulk wastepaper. To the extent that baling at the source is practiced, handling and transportation costs to the dealers' processing sites are decreased.

Wastepaper is segregated by grade and sorted to remove unacceptable material manually at the dealer-processor's plant—probably the most expensive phase of processing.[59] Once the wastepaper is sorted and segregated, it may either be baled directly or it may first be shredded or hogged and then baled. Use of baling, shredding, and hogging equipment requires substantial capital outlay (baling equipment used in a modern paperstock packing plant may cost as much as $250,000), and a dealer-processor must handle large volumes of wastepaper to justify such investments.[60] Finally, the baled paperstock is accumulated until there are carload lots to be supplied to consumers. The baled paperstock is generally sold to mills on an "f.o.b. trucks or cars at dealer's or producer's plant" basis.

As illustrated in the following table, uses of paperstock vary with its grade. High-grade pulp substitutes (usually conversion wastes) may be used in primary recycling or as pulp substitutes in the production of other lower grade papers, combination paperboard, or corrugating medium for corrugated board.[61] High-grade deinking paperstock is used principally in the production of lower grade papers, and marginally in paperboard production. Mixed, news, and corrugated grades of paperstock are reused primarily in combination paperboard and construction paper and board. Small portions of these grades are used in low-grade paper production.

The materials which compete with paperstock for markets most directly are the various types of woodpulp: ground wood, sulfite (or acid), sulfate (or kraft), and semichemical. This apparent

[58] *Ibid.*, pp. 43-44.
[59] *Ibid.*, pp. 57-59
[60] *Ibid.*, pp. 64-65.
[61] Darnay and Franklin, *op. cit.*, p.4-41.

competition between woodpulp and paperstock, however, is subject to some qualifications. Paperstock is bought principally by mills which are substantially dependent on paperstock for raw materials, while integrated mills, which produce their own virgin pulp and process it into paper, use only marginal amounts of paperstock to supplement their pulp supplies. The market for wastepaper among integrated mills is not really competitive, as most domestically consumed woodpulp (89.4 percent in 1968) is produced from captive virgin raw materials.[62] Similarly, most mills which have invested large amounts of capital in equipment to process relatively low-cost paperstock can ill afford to allow their large capital investments to remain idle while buying larger portions of relatively high-cost woodpulp.

The question of the substitutability of wastepaper and woodpulp is critical in a discussion of the present and potential dynamics of paper recycling. Technologically, the paper industry could accept a much higher quantity of paperstock than it does.[63] While Kraft-paper producers now consume only about 5 percent of their input weight as secondary fiber, technical studies have shown that such inputs, in the form of old corrugated boxes, could be increased to between 30 to 50 percent without violating paperboard quality specifications.[64] Bleached grades of printing paper, now using paperstock as 15 to 30 percent of input fiber, can be made entirely of wastepaper recovered from printing and converting operations and data processing centers.[65] Old newspaper can be deinked and used as the only fiber input in the production of newsprint.[66] Construction paper and paperboard can be produced with a much larger portion of paperstock than the 50 percent used now.[67]

[62] *Ibid.*, p. 4-22.
[63] *Ibid.*, p. 4-54.
[64] *Ibid.*, p. 4-55.
[65] *Loc. cit.*
[66] *Loc. cit.*
[67] *Ibid.*, p. 4-56.

Paperstock consumption by grade and use, 1967 1,000 tons*

Paperstock grade	Paper-board	Paper	Construc-tion	Pulp	Total	Percent of total
Mixed	1,888	453	439	-----	2,780	27.4
News	1,573	254	178	-----	2,005	19.8
Corrugated	3,085	102	111	-----	3,298	32.6
Pulp substitutes	714	191	-----	42	947	
Deinking grades	128	354	-----	-----	482	20.2
Other grades	612	-----	-----	-----	612	
Total	8,000	1,354	728	42	10,124	100.0
Percent of total	79.0	13.4	7.2	0.4	100.0	

*From 1967 Census of Manufacturers, Industry Series; preliminary reports for SIC's 2611 Pulp Mills, 2621 Paper Mills, except building paper, 2631 Paperboard Mills, 2661 Building Paper and Building Board Mills; American Paper Institute, Paperboard Group; MRI estimates.

The paper industry structure makes it difficult to substitute paperstock for woodpulp. Equipment and mill locations are employed which are not flexible with regard to raw materials inputs. As discussed above, most paperstock is purchased by mills which are substantially dependent upon paperstock as a raw material and with current prices cannot afford to shift to using larger quantities of woodpulp. In addition, such mills are generally located in areas near sources of paperstock and distant from the integrated mills and their forests. The distance from pulp supplies and the resulting high freight costs further discourage the substitution of woodpulp for paperstock. Finally, purchased woodpulp supplies are not particularly dependable. Since integrated mills (which are the only sources of purchased woodpulp) sell only their excess pulp production, consumers of purchased pulp are subject to wide variations in the quantity of pulp available.[48]

Integrated mills find it difficult to increase their consumption of paperstock over the short run for a number of reasons. These mills usually locate near the source of virgin raw materials to minimize their overall transportation costs.[49] One result of locating in areas generally distant from population centers is that any paperstock which is consumed must be transported relatively long distances. When the low value of paperstock, along with its transportation characteristics (low density, bulkiness, and necessity to be hauled in boxcars) are considered, it becomes clear that consumption of any

[48] *Ibid.*, p. 4-73.
[49] *Ibid.*, p. 4-34.

substantial quantity of paperstock by integrated mills is not economically feasible. Beyond transportation, there are other cost barriers, principally those of installing the equipment necessary to process (*e.g.*, deink or remove contaminants) any increased volumes of paperstock.[70] These two economic factors militate against the use of more paperstock by integrated mills, particularly when such mills have plentiful supplies of captive raw materials (commercial forests) from which they can produce relatively low-cost, high-quality pulp. "For these reasons," a recent study for EPA asserts, "the raw materials competition between woodpulp and paperstock is not severe and the wastepaper trade is not influenced by the activities of marginal buyers (integrated mills) of paperstock."[71]

The demand for paper products by consumers in the United States appears to be very strong. During the decade of the sixties, paper consumption grew at a rate of 4 percent per year. By 1980, consumption is projected to be 60-percent higher than the 1970 level. The demand for those products which use the major portion of paperstock in their production has not shown considerably smaller increases. During the decade from 1959 to 1969, paperboard consumption grew from 15.97 million tons to 26.38 million tons, or 65 percent.[72] At the same time, solid woodpulp board consumption increased from 8.99 million tons to 19.06 million tons, an increase of 112 percent. During the same period, combination paperboard (made from woodpulp and paperstock) consumption increased from 6.98 to 7.32 million tons, an increase of only 5 percent. The end result was that combination paperboard's share of the market fell from 43.7 percent in 1959 to 27.8 percent in 1969.[73] In light of the fact that the paperboard sector is the largest consumer of paperstock in the paper industry, this substantial relative decline in demand for "board" has resulted in the relative stagnation of the derived demand for paperstock.

There are several factors underlying this relatively declining demand. Improved woodpulping technology has enabled industry to utlize abundant virgin raw materials at low cost and in high quantity. As a result of this development, most paper capacity installed since 1945 has been woodpulp-based and located near virgin raw materials.[74] These new mills have taken advantage of a

[70] Battelle Memorial Institute, *op. cit.*, pp. 122-129.
[71] Darnay and Franklin, *op. cit.*, pp. 4-44.
[72] *Ibid.*, pp. 4-30.
[73] *Loc. cit.*
[74] *Ibid.*, p. 4-34.

demand for virgin fiber which has outpaced that for paperstock in three ways:[75] First, products made from paperstock tend to expand their markets at lower rates than other products. Secondly, pulp has invaded some markets for paperstock in the area of packaging as esthetic standards have changed, requiring materials with improved appearance and purity, although the functional performance requirements have not changed. Finally, paperstock has added only one new market in recent years, newsprint.

Before turning to a discussion of the elasticity of demand for paperstock, a review or restatement of the salient factors influencing the supply and demand for paperstock is in order. Wastepaper is not intentionally produced but results from manufacturing activity and product consumption and discard patterns. The supply of wastepaper is uncontrolled and bears no direct relation to the demand of paperstock; wastepaper generation is generally the consequence of production rates in the high volume (virgin fiber) segment of the industry, while paperstock is consumed by the segment with low production rates. The total usable supply is relatively constant in the short run because wastepaper dealer-processors employ only those sources necessary to fulfill the current demand and it takes time for new sources of supply to be developed in response to an increase in demand. A similar timelag also exists when demand declines and wastepaper sources or collectors must be "turned off." Finally, wastepaper dealer-processors must compete actively for sources of the higher quality wastepaper. As a result, dealers are reluctant to relinquish good sources of wastepaper in "lean" times and have difficulty in developing new sources when demand increases. Most paper-converting operations sell all of their wastes, and the total supply of most high grades is not expandable. On the other hand, bulk grades are usually in more plentiful supply, regardless of demand conditions.

The demand for various grades of paperstock is determined by the level of output in four basic sectors of the secondary paper industry: deinked newsprint, business printing and tissue papers, combination paperboard, and construction paper and board. Markets for combination paperboard and construction paper are more cyclical than those for most other grades of paper and board.[76] Most mills are careful to avoid driving prices down sharply in the wastepaper market, however, because they are so completely dependent upon

[75] *Loc. cit.*
[76] *Ibid.*, p. 4-66.

the wastepaper dealer-processor network for raw materials. It would not serve the interests of paperstock users if large numbers of dealer-processors were forced out of business. It has also been observed that products fabricated with high proportions of paperstock do not generally compete with products made of virgin fibers. As a result, the demand for wastepaper may be out of phase with supply, with the supply of obsolete wastepaper usually exceeding demand.

As the short-term supply of wastepaper is relatively unresponsive to price changes, price index changes generally indicate changes in demand for wastepaper.[77] Because short-run supplies are relatively fixed, with timelags involved in acquiring new supplies in boom times and turning off other supplies during periods of decreasing demand, prices fluctuate much more widely than consumption levels. A change in consumption levels in one segment of the paper industry may affect prices in a number of paperstock grades, particularly those in the bulk paper category. New supplies of wastepaper are integrated into the industry structure very slowly because the demand for wastepaper increases slowly.[78] Temporary increases in demand are not unusual, but generally do not last longer than a few months. Because these increases in demand are so brief, dealer-processors do not seek out new sources of wastepaper supply. In the rare event that new supplies are developed and integrated into the industry structure, prices will soon decline to a new equilibrium.

In summary, the prices and quantities of reclaimed wastepaper are determined principally by the demand for paperstock. The demand for paperstock, in turn, is a function of the demand for paper products using large portions of paperstock inputs, the current paperstock export levels, the supply and prices of woodpulp and pulpwood, and other factors. Most of the available evidence indicates that paperstock's demand is relatively unresponsive to changes in price. Except for aberrations during the Korean conflict, paperstock consumption was relatively stable between 1950-1970, with a modest long-run growth trend, while paperstock prices[79] ranged from an index of 153.9 in March 1956, to 67.0 in April and

[77] *Ibid.*, p. 4-67.

[78] *Ibid.*, p. 4-66.

[79] Paperstock prices fell less than 17 percent between 1966 and 1971, according to the Bureau of Labor Statistics' *Wholesale Prices and Price Indexes.* This is in sharp contrast to assertions by the National Association of Secondary Materials Industries (NASMI) that "In 1971, the price for all paper scrap items was 32 percent below that of 1966."

May of 1961.[80] A recent example of the relative unresponsiveness of paperstock demand to price fluctuations was the 1.2-percent increase in paperstock consumption (from .868 to .878 millon tons) which accompanied a 34.1-percent decline in the wastepaper price index (from 113.2 to 74.6), between July 1966 and August 1967 (the prices discussed are "f.o.b. dealer's shipping point" prices, in contrast to "delivered" prices).

On the basis of the 1-percent waybill sample for 1969, we find that the average revenue per ton-mile for paper waste and scrap (STCC 4024) was 1.99 cents. The resulting average revenue per ton was $7.26 per ton of paper waste and scrap and $11.38 for pulp. The higher revenues per ton-mile for paper waste may result from its lighter loads and shorter hauls. The average weight per carload of paper waste was 34.1 tons; for pulp it was 58.2 tons; the average length of haul for paper waste was 333 miles and for pulp it was 871 miles. Unless paper waste can be compacted to a greater extent, it will continue to underutilize railcar capacity relative to pulp. In terms of the average revenue per car-mile received for the service of moving the car by rail, paper waste travels for 74.4 cents while for pulp the average rate is 76.1 cents. In addition, both commodities are baled and shipped in boxcars; but, whereas, pulp is securely baled and there is little chance of bales breaking in transit, wastepaper has a greater probability of bale breakage and would present greater clean-up problems in that event. Without comprehensive cost data, however, it is not possible to determine what portion of the apparent disparities in woodpulp and paperstock freight costs may be attributed to differing transportation characteristics.

Preliminary estimates based upon the 1969 1-percent waybill sample and 1970 freight commodity statistics indicate that the portion of total wastepaper consumption in 1970 (10.27 million tons), which moved via rail was 4.18 million tons, or 39.7 percent.[81] This figure reinforces the statements made previously that the major consumers of paperstock locate near their sources of supply to minimize freight costs and assure themselves of a steady, accessible supply of their raw materials. It appears that many such consumers

[80] *Ibid.*, pp. 4-68 through 4-73.

[81] ICC Bureau of Economics' estimate obtained by dividing tonnage of scrap or wastepaper (STCC 4024) moved by rail in 1970 (derived from 1970 Freight Commodity Statistics) by the total consumption of wastepaper in 1970 (derived from *Pulp, Paper, and Board*, Department of Commerce Quarterly Industry Report, January/April 1972). The calculation follows:

4,180,183 tons/10,530,000 tons = 0.397.

are located near enough to their suppliers to move the paperstock via motor carrier.

NASMI presents four comparative examples which it earlier presented in congressional testimony designed to show the relationships of transportation cost to selling prices of woodpulp and wastepaper. The most extreme example shows the shipment of pulp from Los Angeles to the East Coast at a transportation cost equal to 21 percent of selling price, whereas, the same figure for wastepaper was 222 percent.

With respect to wastepaper, the railroads point out that NASMI's examples relating to the movement of this commodity from West Coast to East Coast are clearly not representative. More specifically, the railroads cite Department of Transportation (DOT) statistics to show that the average length of haul for wastepaper was 329 miles, and for woodpulp 865 miles; with the average revenue to the railroad per car for wastepaper to be $247 and per carload of woodpulp to be $663. The railroads assertedly have kept the freight rates on wastepaper low by publishing incentive loading rates, under which the lowest rate today is approximately the same as that available 9 years ago, notwithstanding the intervening inflation and rising costs.

The railroads also contradict NASMI's claim that the recycling of wastepaper has been retarded by freight rates. In this regard, the carriers point out two examples in which the cause of nonrecycling was other than rail freight rates. In one instance, it appeared that the Garden State Paper Company offered to buy up to 5,000 tons of old newspapers a month for 5 years from the city of New York, but did not receive a reply to its offer. An official of the N.Y. Environmental Protection Administration is reported as saying that the city is still considering the offer, since it is interested in removing wastepaper from the solid-waste stream, but that it has not yet been demonstrated that it can accept the offer without losing money. In the other example, an editorial in the Paper Trade Journal was quoted to show that the wastepaper recycling problem is much more complex than appears at the surface. The gist of the quoted editorial is that the integrated pulp and papermills dispose of their output at unrealistically low prices, thus leaving little room for the operation of papermills consuming waste paper. The editorial poses the rhetorical question: "How can (the recycling-mill) sell his perfectly adequate, but slightly inferior, products if the large virgin pulp mills are always offering their products at bargain basement prices?" Further responding to NASMI's claim that rail

transportation charges are determinative of whether wastepaper will be recycled, the railroads point out that such factors as separation of waste from other refuse, baling, and preparation for shipment add to the cost of marketing wastepaper; and that, more than any other factor, the market price of virgin woodpulp is determinative of whether wastepaper will be marketed and recycled.

The volume of wastepaper recycled annually over the past 10 years has averaged about 11 million tons, which represents about 20 percent of wastepaper generated and about 22 percent of the fiber requirements of the paper industry. High grades of wastepaper encounter little difficulty in being recycled in competition with virgin woodpulp, but in a poor market lower grades face difficulty in moving. A 3-percent freight rate increase thus could have a potential to reduce demand of the lower grades, although the controlling factor in the movement of even these grades appears to be the fiber demand and available supply and price of virgin pulp.

As to the conservation effects of recycling, it has been shown that the recycling of products of nonrenewable resources, such as minerals, represents true conservation, as opposed to renewable resources, such as trees. Trees are a crop and they are grown to produce wood products. They are harvested and replaced with new growth, and this activity is economically essential to the forest regions and the people dependent upon them.

Paper litter is solely the result of human carelessness and apathy. The salvaging of paper litter for recycling would be economically unrealistic, and the fibers therein are often so deteriorated and contaminated that they would be essentially unusable. Thus the freight rate question is irrelevant to paper litter. Increased recycling of wastepaper creates additional water quality and solid waste disposal problems at the mills because 10-50 percent of the weight of waste paper is lost in repulping, with the lost materials including fibers as well as inks, dyes, fillers, coatings, resins, and other chemicals.

Movements of pulpwood and woodchips by railroad have decreased between 1968 (3.6 million cords) and 1971 (3.3 million cords), according to the Southwestern Paper Traffic Conference. On the other hand, Southern Railway transported about 100,000 tons more of scrap paper in 1971 than it did in 1967. Southern states that this is a result of retained rate advantages enjoyed by scrap paper over woodpulp and pulpwood. In 1966, all railroads transported 7.8 million tons of wastepaper. The volume rose to 8.1

million tons in 1970, although there were four general freight rate increases during this period. The following chart indicates the costs and profits of transporting wastepaper by the railroads:

Railroads' average cost and profit per car of wastepaper

(RATE: IN CENTS PER HUNDRED POUNDS)

Territory	Miles	Rate—maximum weight-80,000 pounds	Revenue per car	Average cost per car	Percent profit per car
Eastern	96	28	$224	$179.20	25
Do	225	40	320	236.00	35
Do	298	43	344	280.00	23
		80,000 pounds			
Southern	100	18	144	114.40	20
Do	168	22	176	143.20	23
Do	205	27	216	164.80	31
		50,000 pounds			
Western	150	37	185	158.50	14
Do	300	50	250	214.50	14
Do	500	63	315	289.00	8

Source: Cost per car—Rail Cost Scales by Territories ICI-68, updated 10 percent.

Midwest Research states the demand for wastepaper is not increasing significantly because papers made of secondary fibers are not holding their own in the marketplace, and customers often reject recycled paper products because of poor quality. In addition, used fibers cannot be employed except in the same quality product or in a product of lower quality than the one in which the scrap was originally used. Producers of newsprint seek only the collection and reuse of newsprint, and other paper manufacturers utilize this same one-dimensional policy. Health considerations are said to constitute another limitation on the reuse of papermaking fibers. Paperboard for food cartons must be made of virgin fiber or clean, sanitary scrap from such paperboard in order to meet sanitary standards. Furthermore, in Europe and Japan where scrap paper is recycled to a great degree, product qualities assertedly are much lower and water pollution is alleged to be enormously greater than in the United States.

Paper scrap consumption may rise significantly in the 1980's if a projected shortage of virgin pulp occurs, and new technological developments prove their worth. The use of high-density balers facilitates the handling of paper scrap and provides a better product. These balers cost about $120,000 and can handle 30,000 tons of paper a year and reduce freight costs up to $5 on trips of 500 miles. This can be economical only if a business has sales approximating $600,000 or more a year. In 1963, 88 percent of 1,120 companies in this business had sales under $500,000, but a centralization of these businesses has been taking place.

The Federal Government, through the General Services Administration (GSA), has changed its specifications for certain types of paper and paperboard products it purchases—principally packaging papers, paperboards, and tissues—to require the inclusion of varying percentages of waste fibers in such products. This is expected not only to spur the purchase of a wider variety of recycled paper products, but also to help stimulate the market demand for papers containing post-consumer waste. The GSA does not have specification or purchase responsibility for printing papers or most types of office papers. These are under the jurisdiction of the Joint Committee on Printing of the Congress, which is studying its policy on this subject.

Under its program, the GSA has divided the sources of reclaimed or recycled fibers into two classes:

Part I is commonly referred to as post-consumer waste; i.e., paper, paperboard, and other fibrous wastes after they have passed through their end-use as a consumer item. Principal among these are used corrugated boxes, old newspapers, old magazines, mixed wastepaper, and tabulating cards. These wastes are collected prior to entering the municipal solid-waste stream. However, any other paper, paperboard, or fibrous wastes which enter into and are collected from municipal solid waste also would qualify under part I.

Part II wastes, as defined by the GSA, include paper or paperboard wastes generated after the completion of the paper-making processes, including such things as envelope cuttings, and obsolete inventories of paper and paperboard. Also included are fibrous byproducts of harvesting, manufacturing, extractive, or woodcutting processes such as flax, straw, linters, bagasse, chips, and other forest residues. In some instances, the GSA requires certain percentages of both part I and part II type wastes, while in others, there is no requirement for any post-consumer (part I)

waste. A chart showing the sources of fiber consumed by paper and paperboard mills follows this discussion on paper recycling.

There are a number of cities today involved in voluntary separation and collection efforts. Here, wastepaper is usually segregated and collected in three categories—corrugated, newspapers, and mixed papers, which include magazines. Newspapers and corrugated paper products are collected by municipalities because they can be easily separated and are readily accepted by recycling mills. Magazines and mixed papers are primarily collected because they are available in large quantities in centralized locations (office buildings, factories, et cetera). Currently those cities with successful recovery programs are concentrating on recovering old newspapers from residences—before contamination—for established markets.

A 4-year-old, sustained paper collection program is operating in Madison, Wis. There, sanitation department trucks collect bundled newspapers put out by residents on a voluntary basis. Collections are made with regular compactor trucks equipped with special racks to hold discarded newsprint during normal refuse collection. So far, participation in the program has been high, and the system is beginning to show a profit. Of the more than 3,000 tons of old newspapers collected in the city of Madison over a 2-year period, the largest portion has been repulped, deinked, and made into newsprint. A small portion was shredded and used in the manufacture of insulation material for homes and commercial buildings. The remainder was used in the production of combination paperboard.

Similar municipal recovery programs are taking place in Hempstead, N.Y., and Louisville, Ky. In Hempstead, as in Madison, newsprint is bundled by residents and collected on the same day as the rest of the solid waste. However, Hempstead uses a separate compactor truck to travel normal collection routes, picking up only newspapers. This one truck covers about five regular collection routes, compensating for the use of expensive equipment and additional labor. In Louisville, an experiment similar to Hempstead's is being undertaken where newspapers are picked up by separate trucks within various neighborhoods and shipped to processing plants for deinking and repulping. Such voluntary separation and collection systems depend greatly on their being recycling mills in the area.

For the paper that does get into the solid-waste stream—and is thus contaminated—there are other means which hold promise for utilizing its value, while reducing the solid-waste volume. One interesting demonstration resource recovery facility is in operation at Franklin, Ohio. Developed through a demonstration grant from the EPA and operated by the Black Clawson Company, the system processes some 40 tons of refuse each day to extract paper fibers in addition to separating out glass and metals. The recovered fibers are presently sold to a local company for use in the manufacture of roofing felt. Further processing, cleaning, and bleaching could upgrade the fibers for use in paper production. One paper company has experimented with this urban fiber and has produced printing paper from it.

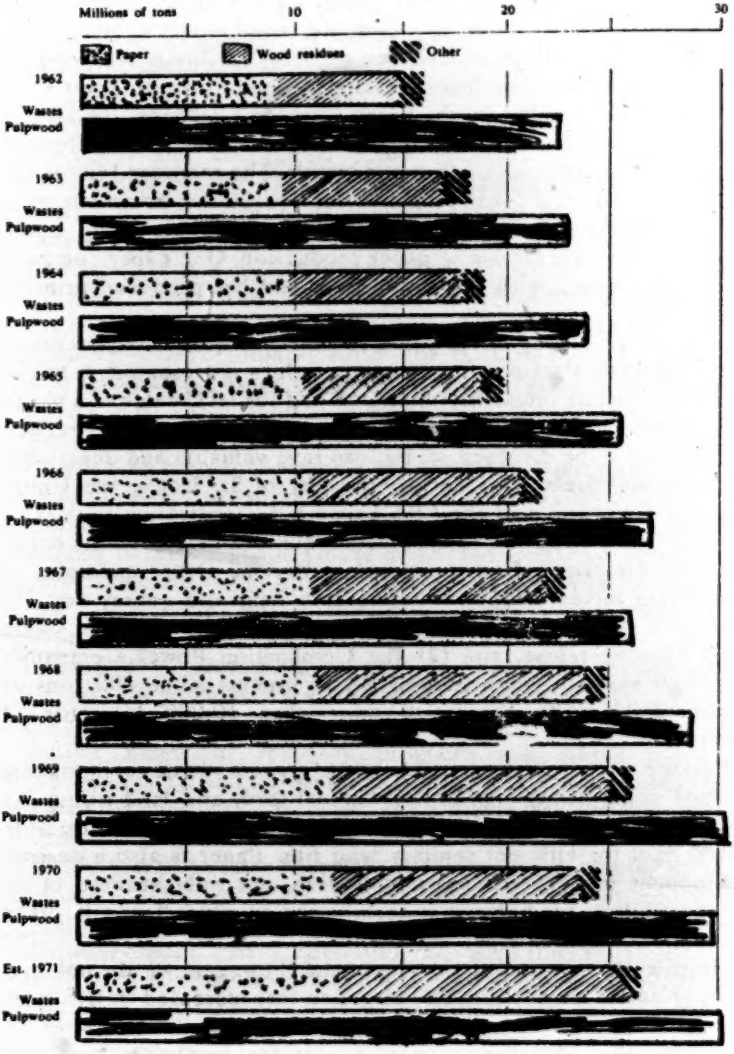
Another promising use of paper and other organic components of the solid-waste stream is for the energy values represented. A ton of shredded organic refuse has about one-half the BTU value of a ton of coal. Utilizing this portion of trash and garbage cannot only reduce the amount to be disposed of, but can save valuable and depletable conventional fuels. This spring, the city of St. Louis, the Union Electric Company, and the EPA began a demonstration project to combine daily some 300 tons of mixed municipal refuse with coal to generate electricity from power plant boilers. Other examples of converting mixed municipal refuse into heat and energy are: (1) Chicago's Northwest Incinerator, which is producing salable steam from burning refuse, and (2) the Combustion Power Company's CPU-400 system, which is designed to process some 400 tons of refuse daily while generating more than 10,000 kilowatts of electricity.

Further uses for paper and other organic waste components include composting, high-protein animal feed, and land filling. As paper is biodegradable and compactable, it is a useful and desirable component for efficient sanitary land fills. Paper is also a desired component in conventional incineration, not only because of its combustibility, but because it absorbs the moisture found in other components of municipal waste.

Despite the continuing developments, however, we do not find any persuasive support for the allegation that increased freight rates on scrap paper will affect its movement for the purposes of recycling. We, therefore, conclude that the maximum 3-percent increase approved in our prior report as to rail rates on wastepaper will not have a significant adverse effect upon the environment.

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Source of Fiber Consumed by Paper and Paperboard Mills



346 I.C.C.

Textile waste.—The environmental issues in regard to waste textiles movements center upon whether, or to what extent, high freight rates or freight rate increases have inhibited, or will inhibit, their movement. More specifically, the statement of Mr. Edward B. Frankel of NASMI in this proceeding contains the following contentions:

1. "Freight rate increases totaling approximately 40 percent within a few short years in the face of declining markets and market values have prevented over a billion pounds of these materials from moving ***."[82]

2. "Had freight rates not increased at all on [these] commodities, the revenue would have increased to the carriers by 58.59 percent by virtue of the same proportionate share of textile waste produced and recycled in 1970 as in 1964. In other words, had the industry been allowed to market the increased supply brought about by the population explosion, the rail carriers would have benefited much more than by having increased rates on these low valued commodities to the point where they are of such major consequence as to preclude movement."[83]

The following assertions are made in support of the above contentions: (1) Only about 520 million pounds (below 3 percent) of discarded textile wastes amounting to 1.2 billion tons are sorted each year, and only a small fraction moves by rail; (2) freight rates at prevailing average length-of-haul (as shown in the 1966 1-percent waybill sample) and minima per car are so high, in addition to processing costs relative to value of the commodity, as to preclude movement; (3) transportation costs make up a substantial percentage of the delivered costs of low-grade textile waste, as compared with the higher grade textile wastes (wiping rags) referred to in the railroads' statement; (4) textile waste traffic fell off 40 percent from 1966 to 1969, in official territory as a result of rate increases, while in the South where, assertedly, the carriers "recognize" value of service factors, traffic rose 4 percent; (5) rate increases have a substantial impact on the environment because, for

[82]Verified statement No. 376 of NASMI in Ex Parte No. 281, March 12, 1972, part II, p. 1.

[83]*Ibid.*, p. 2. The fact is that if rates had not been increased between 1966 and 1969, and the 1966 loading characteristics had prevailed, the rates would have been below out-of-pocket costs for 1969, and the railroads would have been worse, not better off.

The rate examples used on page 3 of the cited statement—at 65 cents at 40,000 pounds, 58 cents at 50,000 pounds, 564 miles—would only barely have covered variable costs in 1969 in official territory (the applicable territory of that tariff) and failed to cover full costs. Thus, it appears that a rate low enough to make the processing of used textiles in the example profitable, would have caused the railroads to lose money—to subsidize the waste textile shippers.

example, in 1970, 21 mills and 27 sorters and processors closed due in part to (increased) freight rates; (6) the increased rates cannot be passed on and must be borne by the processor; (7) rates on rags are scheduled to increase 6 percent, while on rag pulp (supposedly a substitute), only 3 percent; and (8) existing rates were found to be more than fully compensatory.

There is little useful information or data available on the diverse and complex reprocessed textile waste industry, or on the transportation of waste textiles. Primary sources of textile waste and scrap are: (1) textile mills; (2) manufacturers of apparel, furniture, et cetera; and (3) social service institutions which collect discarded clothes. The primary uses for reprocessed waste textiles are: (1) padding and batting; (2) paper and vulcanized fiber; (3) cotton wipers; (4) reprocessed wool fabric; (5) flock and filer; (6) roofing and flooring; (7) used clothing; and (8) export.

The Census of Manufacturers 1967 and two recent recycling studies have estimated the reprocessed textile industry as having an annual output of 1.4 to 1.6 billion pounds. NASMI and other industry sources assert that only a fraction of textile wastes move by rail (generally estimated at 10 percent), while the balance moves by private motor carrier. However, on the basis of the 1969 Carload Waybill Sample, 1.760 billion pounds of materials were shipped by rail as "textile waste, scrap or sweepings." Obviously, most "textile wastes"[34] do not flow through the textile reprocessing industry, but are industrial byproducts which are either reprocessed within integrated firms or are sold directly to users by the operator, bypassing commercial dealers and/or processors.

All sources do point, however, to a decline in the processing of used textiles, despite the growth of available waste. Secondary textile waste dealers were paying as much as $120 to $140 per ton for mixed rag bundles in the midsixties; the current price range has dropped to between $55 and $65 per ton. Wiping cloths, padding and batting, wool waste, cotton clippings, and old and new rags used in construction material are being replaced by other products, which do not necessarily cost less to reproduce, but which provide a higher standard of performance. The following have been identified as the primary factors affecting used textile markets:

(1) Foam has replaced cotton batting and padding almost 100 percent in the auto industry in recent years; at the average of about

[34]The 58 separately coded commodities within this group include thread, rope, worn-out mattresses, wool dust, cotton refuse from cottonseed oil, mills, tire cord, and old clothes, to name just a few.

30 pounds per car, and on an output of about 8 million cars per year, this alone would cause demand to be lower by 240 million pounds annually. In addition, the demand for reprocessed textiles for padding, upholstered furniture, mattresses, et cetera, appears to have fallen by about 16-20 million pounds between 1963 and 1967.

(2) Usage of rag in papermaking has been steadily declining over the years. Rag is now being replaced by woodpulp and cotton linters, which cost considerably less to produce and do not contain synthetic contamination. According to the census of manufacturers, pulpmills used negligible rag in 1967, and the use of rag in papermills fell 18 percent between 1963 and 1967. In the manufacture of paperboard, textile waste use decreased about 15 percent during the same period.

(3) New textile and disposable paper wipers are replacing used textiles in the wiper market by virtue of their convenience and overall cost advantage.

(4) The desire for "quality" wool products, combined with the wool labeling act and competition in export markets, has depressed the demand for reprocessed wool, even though the latter is not technically an inferior product. According to the census, use of reprocessed wool fiber decreased almost 40 percent between 1963 and 1967.

(5) During the 1963-1967 period, the reprocessing of flock decreased by about 20 percent.

(6) The roofing materials industry, a primary market for inferior quality rag, has recently been substituting pulp for rag due to the synthetic contaminants in lower grade rag bundles (the price is too low to cover sorting and processing). The building paper industry, according to the census, was the only industry significantly to increase its use of used textiles from 1963 to 1967; however, the synthetic contaminant problem may have been of more recent occurence.

(7) According to a recent report, the market for used clothing, which is largely an export commodity, has been suppressed by foreign import policies.

The above information, while not quantitatively sufficient to prove or disprove the case, indicates that there was a substantial decline in the used textile market even during a period in which rail rates did not undergo a general increase, i.e., the early to mid-1960's. This market decline, combined with accelerating technological developments and increased labor costs in this highly labor-intensive industry, constitutes sufficient evidence to indicate

that nontransportation factors, not rail rates, have been the primary cause of the declining textile waste industry. Thus, the assertion that railroad rates might be largely responsible for the failure of "over a billion pounds" to move is not supported by the facts. For this reason and that indicated in footnote 83, the statement that 58 percent more traffic would have moved if rail rates had remained constant also appears unsupportable.

In addition to the technological shift, the waste textile industry appears to be continuing it geographic shift away from the Northeast and into the South (a movement parallel to that of the companion textile industry). Between 1963 and 1967, total value of the waste processing industry in the South doubled, while it declined by 16 percent in the Northeast. In view of the decline in the industry, and the shift from North to South, it is not surprising that the drop in rail traffic between 1966 and 1969, registered in the waybill data, took place in the official territory. The drop in carloads of 40 percent overstates the actual situation, however, as the average load per car increased substantially in the official territory. Tons moved in the official territory decreased less than 25 percent, but rose almost 5 percent in the South.

On the basis of the data presented in the Burden Study, average revenue per hundredweight on all textile scrap in the official territory in 1966, was barely sufficient to cover out-of-pocket costs and covered only 88 percent of fully allocated costs. Between 1966 and 1969, while costs were kept practically constant by encouraging heavier loading of cars, "rates" (average revenue per ton-mile) in the official territory increased about 10 percent bringing revenue to 106 percent of full costs. In the South, on the other hand, the average revenue per ton-mile was above that in the North, while unit costs were lower. In 1966, revenue was 140 percent of out-of-pocket and 120 percent of fully allocated cost on the basis of territorial costs for unequipped boxcars with a 21-ton load and 250-mile haul. Rate changes increased average revenue per ton-mile only 7 percent between 1966 and 1969, while unit costs rose so that revenue fell to 132 percent of variable costs by 1969. Nonetheless, as noted above, traffic in the South increased despite the increasing rates and despite the fact that the average revenue per ton-mile in the official territory, even in 1969, was below that for the South. (Average revenue per hundredweight was slightly lower in the South, due to shorter average haul.) These averages must be used with great caution, however, since analysis of individual movements indicate a wide range of origins and destinations, types of textile wastes, and

revenues. With respect to textile waste, NASMI cites two examples, the more extreme of which shows the shipment of a sweeping grade of waste from Buffalo, N.Y., to Toronto, Canada. The sale price of the sweepings is stated to be $1.75 per 100 pounds while the "average freight to plant" was $0.78 and "average freight to Toronto" was $0.59. NASMI thus concludes that the freight charges equal 78 percent of sale price.

As to textile waste, the railroads state that in the examples submitted by NASMI to show that freight charges on textile waste are high, the two components of freight charges were the "average freight to plant," which appears to be a local trucking charge to bring the waste to the plant, and "average freight to Toronto," which is the rail-haul charge. As the local trucking charge was $0.78 per 100 pounds, it is argued that the long-distance rail charge of $0.59 per 100 pounds not only is reasonable but is also a smaller fraction of the selling price. The example, it is asserted, also tends to show that diversion to motor carriage is not likely under the present circumstances.

The railroads criticize NASMI for displaying "the banner of environmental protection, [while failing] *** to indicate in any way precisely how an increase in rail rates on textile waste could possibly adversely affect the quality of the environment":

> It (NASMI) speaks of the vast accumulation of solid waste that constitutes potential recyclable material, but offers no indication that such normally discarded waste, for example, has ever moved to recycling plants by rail or that rail rates have ever been sought on such material. No discussion at all is devoted to the obvious fact that recycling plants collect their raw materials within short radii and most often by private truck. There is manifestly no relationship between the growing accumulation of discarded textiles and rail freight rates. As to textile waste moving *from* recycling plants to industrial consumers, nothing is contained in the protest which would indicate that rail rates in the past or rail rates increased as proposed in this proceeding would operate to cause substantial diversion of traffic to truck, much less prevent transportation altogether. The railroads who share protestant's environment also share its concern for ecological improvement. They submit that the increase proposed for textile waste is in no wise inconsistent with that goal.

The increases approved herein do not apply to movements within the South where about two-thirds of the total United States textile production occurs. A 3-percent increase on a 50,000-pound shipment for 527 miles would be about $9.46 a carload, in contrast to the value of such lading of at least $5,500 a carload. It is generally agreed that the so-called "substitutes" for waste textiles are replacing waste textiles for reasons unconnected with the cost of transportation.

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Our conclusions are the following:

(1) Rail transportation rates are probably of lesser importance to the declining role of this recycling industry than the technological and market problems discussed above; and unless these latter problems are solved, constant or even decreased rates are not likely to be of substantial or long-run aid to the industry.

(2) Regardless of "revenue potential," in order for traffic to be advantageous to the railroads, the revenues must at least cover the costs of movement. This, the rates in several of the above examples fail to do on the average.

(3) Because of the increased use of synthetics, the cheaper bundles of textile waste are becoming less economical to sort and process, and less desirable. This trend cannot be reversed through the mechanism of transportation rates.

In summary, there is no evidence sufficent to prove the case for or against the proposed increase on environmental grounds. In the absence of specific cost information, it is not possible to determine whether a particular class of waste materials is carrying a discriminatory rate. However, the preponderance of evidence indicates that the industry's problems and solutions lie largely outside the realm of rail freight rates.

Petroleum refinery wastes and waste sulfides.—Merichem is engaged in the recovery of usable chemicals from petroleum refinery wastes. It receives inbound petroleum wastes from refineries, and it ships outbound cresylic acids, phenol, and waste sulfide. This protestant would not object to the proposed rate increases on cresylic acids and phenol, if found to be otherwise warranted, but it requests holddowns on the petroleum refinery waste and waste sulfide.

This protestant alleges that it is a financially depressed firm and cannot afford to pay higher freight rates on the low-valued refinery waste and waste sulfide. Moreover, waste sulfide, which is said to compete with caustic soda and salt cake, is shipped in a diluted form of less than 20-percent concentration. Since caustic soda and salt cake are shipped in concentrated forms, Merichem contends that an across-the-board freight rate increase is inequitable because a 2.5-percent surcharge assertedly has the effect of only a 2.5-percent increase in the transportation costs of usable salt cake, a 5-percent increase for caustic soda, and 12.5-percent increase for usable waste sulfide. Merichem also asserts that past rail rate increases have caused diversion of traffic from rail to trucks and barges and that the present proposed rate increase will do so too.

More directly pertinent to the environmental issue, Merichem states that, before it came into being, the refinery wastes were released into the watersheds, causing pollution of water resources. Thus, Merichem's operations not only serve the public interest by removing toxic substances from discharged wastes, but the recovered chemicals are then recycled. To illustrate its contention that freight rate increases impair its ability to remove the pollutants and recycle them, Merichem cites its discontinued collection of wastes from 11 refineries, as a result of rail rate increases, where barge transportation was not available.

In sum, Merichem contends that the low-valued and dilute refinery waste cannot bear the proposed rate increases and that the rate increases would be self-defeating due to the loss of rail traffic through diversion. It also argues that any impairment in its ability to remove pollutants from waste discharge will adversely affect the environment. Although it does not allege that the proposed rate increases are unreasonable or are not cost justified, it requests this Commission to grant holddowns on its commodities under our power to adjust rates to meet public needs.

The railroads contend that the refinery waste and waste sulfide are already being transported at very low rates due to the carriers' favorable response to prior requests for reductions in the charges on these commodities. As examples, the railroads show that the present rate on refinery waste is about 25-percent less than the rate for residual fuel oil, another refinery byproduct, between the same points.

The carriers dispute Merichem's claim that freight rate increases would cause it to reduce its operations and perhaps to go out of business. They say that Merichem has received an increasing amount of petroleum wastes by rail despite past rate increases, and that its Houston plant is now operating at capacity. Thus, past rate increases assertedly have not interfered with the collection of refinery waste nor with the distribution of recycled products. According to the railroads, the proposed rate increases will not cause any change in the handling of petroleum waste and will not have any adverse impact on the environment, but the modest increase proposed represents only a fair and reasonable share of the increased costs experienced by the carriers.

As to Merichem's claim of inequity due to the low concentration of usable chemicals in its raw materials and products, the railroads point out that it was the shipper's choice to move these com-

modities in dilute form. In fact, Merichem itself sought and obtained the present low rates on waste sulfide containing no more than 20-percent usable material. Moreover, the rate per ton for moving waste sulfide a given distance is substantially lower than the rates per ton for moving salt cake or caustic soda the same distance. With respect to diversion of traffic, the railroads apparently believe that such diversion will occur whenever barge service is available.

The railroads argue that the thrust of Merichem's contention is that the carriers should subsidize the movement of petroleum wastes even if this has to be done at a rate level below costs. The carriers find it significant that when Merichem itself decided that continued collection of wastes from 11 refineries would be unprofitable, it simply stopped collecting there. The railroads suggest that the disposal of petroleum wastes should be considered a cost of doing business, and that the oil companies, who create the wastes, should bear part of the burden of disposal. It appears that Merichem is presently paying refineries for wastes and the railroads conclude that the refineries perhaps should give the wastes to Merichem free or even pay for disposal.

In response to Merichem's allegation that it is in a financially depressed condition, the railroads submitted data from Merichem's financial statements filed in Texas to show that it had an increase in sales from 1970 to 1971, and that its net income before Federal income taxes rose from about $70,000 in 1970, to more than $520,000 in 1971. The railroads also dispute Merichem's claim that refinery wastes have virtually no market value by pointing to the facts that such wastes are shipped over long distances at considerable cost and that some of these wastes can be shipped directly to papermills for use without intermediate processing.

Finally, the railroads show, that contrary to the impression conveyed by Merichem, that refineries either must sell the wastes to Merichem or dump them in the water streams, other methods of disposal are available, including one developed under an EPA grant. Most of these alternative methods of disposal, some of which have been widely used in European refineries for years, involve an element of cost to the refinery. The fact that some refineries apparently already are paying for the disposal of their wastes, instead of selling the wastes to Merichem, is analogized by the railroads to the practice of petrochemical plants which pay for the disposal of wastes they created.

Statistics show that rail shipments of petroleum wastes to Merichem rose from 97.3 million pounds in 1969, to over 100

million pounds in 1971. A 4-percent rate increase would result in increased charges of $36 a car or less than 1 percent per hundredweight. These rates are presently at a low level.

Protestant Merichem continues to receive wastes from over 100 refineries in 21 States and Canada. It recently supported the establishment of a rate of 80 cents per hundredweight from Amoco, Va., to Houston, a distance of 1,431 miles. In contrast, the present rate from American Oil's refinery at Sugar Creek, Mo., a representative midwestern movement, is only 48 cents per hundredweight. Since it imports wastes for long distances from Canada, Pennsylvania, or Virginia, there may be reasons other than freight rates for not serving other plants within that radius. For example, the amount of useful chemicals in any particular batch of petroleum wastes depends on the type of crude processed by the refinery, the processes, and the chemicals employed. Thus, the use of wastes of a particular refinery may largely depend on the amount of recoverable products in the waste and the selling price of such recoverable products. It is also apparent that if Merichem pays the freight and utilizes leased tank cars it is to its advantage to obtain petroleum wastes as close to Houston as possible where the freight and tank car turnaround times will be minimized. Moreover, the allegation that the increases will result in a diversion from rail to barge is contradicted by protestant's admitted increase in the use of rail service from 1969 through 1971. Finally, when barges are available some traffic may be diverted regardless of the railroad rate level.

Protestant's contentions that refineries depending on rail movement may again resort to dumping wastes into watersheds is simply erroneous. Refinery operators are cognizant of the need to control pollution and are required by law to do so. Moreover, there are a number of alternatives available to refiners, including direct sale to papermills or to Merichem's competitors, and use of fluid bed incineration, a nonpolluting method of waste disposal. Additionally, in the fluid catalytic cracking process the spent caustic waste solution may be stripped of hydrogen sulfide. Furthermore, petroleum products may be treated so as to remove the sulphur directly rather than through caustic washing. The sulphur so recovered is in a salable form and there is no creation of caustic petroleum refinery waste. The trend in the industry is toward this type of process.

The adopted increases on these commodities will not in our judgment affect the movement of these commodities for recycling purposes.

Scrap glass[85]*—recycling and transportation.*—Obsolete scrap glass comprises 6 to 8 percent by weight of the Nation's solid waste.[86] Recent estimates, however, indicate that only 4.5 percent of obsolete scrap glass (cullet) is recycled.[87] This rate is low, comparable to the recycling rates for rubber, plastics, and textiles. In view of estimates that 60 percent of the annual glass production is potentially recoverable, we need to consider the various factors impeding progress in increasing the recycling rate.[88]

The major problem in its recovery is that of sorting obsolete scrap glass from solid wastes. As one authoritative source states, "The key economic parameters of cullet acquisition from mixed waste are dependent on the technical process for separation and upgrading of cullet from mixed waste."[89] Experiments currently are underway to develop methods for the mechanical separation of obsolete glass scrap from mixed refuse and the sorting of that glass into its respective colors.[90] Work is also being done to improve glass crushing and cleaning equipment. Since all these efforts are still experimental, however, their economic feasibility has not been established.

The recycling of "home" or "prompt industrial" glass scrap—that resulting from the production of glass end products in the factory—is burdened with fewer problems than obsolete scrap glass recycling. Most of these fabrication or production wastes (1,350,000 tons in 1967) are reused on an in-plant basis.[91] This scrap is clean, is free of contaminants, and does not require the arduous and expensive sorting associated with obsolete glass scrap recycling. Manufacturers clearly favor internally generated glass scrap because they have no question about its chemical composition and quality.[92]

[85]In its comments on the draft impact statement, EPA contends that this Commission has failed to address the environmental impacts of increased freight rates on returnable containers. First, it would not be practical for us to consider every recyclable commodity individually. Second, the discussions found later in this report concerning glass scrap and nonferrous metal scrap are applicable to the recycling of glass and other containers and make reference to this specific commodity. Finally, it does not appear that returnable containers are included within the list of commodities which were to be investigated in this proceeding as reopened by order of November 7, 1972 (see footnote 5, *supra*).

[86]Arsen Darnay and William Franklin, *Economic Study of Salvage Markets for Commodities Entering the Solid Waste Stream* (for Environmental Protection Agency), Midwest Research Institute, December 1970, p. 7-11.

[87]Loc. cit.

[88]*Economic and Environmental Analysis of Glass* (draft copy for Council on Environmental Quality), Midwest Research Institute, August 1971, p. 15.

[89]*Ibid.*, p. 7.

[90]Sullivan, P., et al., *Electronic Color Sorting of Glass from Urban Waste*, Bureau of Mines Solid Waste Research Program Technical Progress Report 45, October 1971, pp. 1-8.

[91]Darnay and Franklin, op. cit., pp. 7-9, 7-13.

[92]*Ibid.*

The glass industry is particularly well suited to the recycling of "home" or "prompt industrial" glass scrap. Most glass plants are fully integrated in that they consume virgin raw materials and produce a finished product. As a result, internally generated cullet can be crushed, mixed with the virgin raw materials, and sent through the entire melting and fabrication process without requiring modifications of equipment or processes. In fact, in glassmaking, cullet is a technically and economically functional input material.[93] The use of cullet actually aids the melting process, since it liquifies at a lower temperature than raw materials. Thus, the thermal efficiency of the furnace is increased. Less fuel is consumed, and the lower melting temperatures required result in longer furnace life and a reduction in repair and maintenance costs. The shortened melting time results in greater output of the finished product per day at reduced costs.

There appears to be no technological limit to cullet usage in certain glassmaking processes. Thus, even if nearly 100 percent of the input were cullet, the end product could be equal in quality to currently produced glass containers.[94]

TABLE

Purchased Cullet Consumption by Sectors of the Glass Industry, 1967
(Aggregates in 1,000 tons)

	Glass containers	Flat glass	Pressed and blown glass	Total industry
Total purchased cullet consumed	100	244	256	600
Total raw materials consumed	12,100	2,500	2,060	16,660
Purchased cullet as a percentage of total raw materials consumption	1	10	12	3.60

Source: Midwest Research Institute.

At present, however, the glass industry's average input of cullet is only 15 percent by weight, and a large portion of that, well over two-thirds, is internally generated. The remainder is composed of cullet purchased by glass manufacturers, and includes both prompt industrial and obsolete varieties. Data are not available which would indicate the relative portions of these three types of cullet which are utilized. As illustrated in the table, in 1967, the glass

[93] *Loc. cit.*
[94] Economic and Environmental Analysis of Glass, p. 13.

container industry purchases of obsolete cullet equaled only 1 percent of its input tonnage of raw materials; the flat glass segment purchased 10 percent; and the pressed and blown glass segment purchased 12 percent of its inputs as cullet. When considered along with the percentage of raw materials these sectors of the industry used in 1967 (73, 15, and 12 percent, respectively), it becomes apparent that purchased cullet, including both prompt industrial and obsolete, comprised only 3.60 percent by weight of the raw materials inputs of the glass industry. Taking into account the fact that most purchased cullet is of the prompt industrial type, only 1 to 2 percent of raw materials inputs in the glass industry is obsolete cullet.

Manufacturers of glass containers consume virtually all of their internally generated cullet.[95] Some excess cullet is produced and sold by the flat glass and pressed and blown glass sectors of the industry, but most of it is purchased by other glass plants which need it to supplement internal cullet when their production rates and pack-to-melt ratios do not yield enough internally generated cullet.[96] The only processing necessary before purchased commercial cullet (all purchased cullet, excluding that collected by citizens' groups) is shipped is crushing, a relatively inexpensive and fast process, so costs are kept relatively low. Estimated average delivered prices for commercial cullet in 1971, were $18.50 per ton of clear glass and $16.50 per ton of amber or green glass.[97]

Obsolete cullet differs from prompt industrial cullet in supply characteristics. Containers comprise at least 75 percent of obsolete glass found in collected waste, and small portions of flat glass and pressed and blown glass make up the remainder; whereas, flat glass composes a larger share of commercial cullet.[98] The most important sources of obsolete cullet are found in the Nation's major population centers, but very little obsolete cullet is actually recycled from muncipal refuse. Most of the recycled obsolete cullet is in the form of refillable or returnable beverage containers which have outlived their usefulness. The glass industry prefers these containers to nonrefillable or nonreturnable containers because of the better quality of the glass from which they are made.[99] A relatively new development in glass recycling is the growth of

[95] Darnay and Franklin, *op. cit.*, p. 7-9.
[96] *Ibid.*, p. 6-16.
[97] *Economic and Environmental Analysis of Glass, p. 12.*
[98] Darnay and Franklin, *op. cit.*, p. 7-19.
[99] *Ibid.*, pp. 7-2, 10, 19.

citizens' groups concerned with environmental quality which have successfully sought the cooperation of the glass industry in recycling a larger portion of nonrefillable containers. In what is generally a volunteer effort, glass containers have been collected, cleaned, sorted, crushed, and transported to the nearest glass factory for a widely accepted price of $20 per ton.[100] At $20 per ton the industry participants are absorbing costs that could not be justified in a narrow economic sense. Prices for processing obsolete cullet other than the "citizen-collected" variety range from $18.50 per ton of clear glass to $16.50 per ton of colored glass, as does the commercial cullet.

As stated previously, it has been estimated that 60 percent of the annual glass production will be recoverable for refabrication when separating and sorting equipment is perfected and put into use on a broad scale.[101] Thus, glass producers could consume the equivalent of 60 percent of their production as cullet without having to make major processing modifications and with no decrease in quality of the finished product. It has been estimated that capital investment requirements to revamp industrial plants would range from $50,000 to $100,000, depending upon the type and age of the plant.[102] Perhaps a more important point is that the changeover could be accomplished within a framework of normal periodic plant improvements practiced by the industry. In addition, if the industry average recycling rate were increased from 15 to 60 percent, total wastes and effluents from glass production would be reduced more than 50 percent and total energy consumption would decline between 30 and 50 percent.[103]

The materials with which cullet competes in glassmaking are, primarily, sand, soda ash, and limestone. These account for 94 percent by weight of the raw materials used in glass production.[104] These does not appear to be any shortage of these low-cost virgin materials. The estimated average cost of the raw materials necessary to produce a ton of glass containers in 1970 was $18.43, delivered.[105] As noted above, the cost of a ton of ***delivered*** clear cullet in 1971 was between $18.50 and $16.50. The materials which

[100] Letter to ICC from Leonard F. Giaco, Assistant Director of Traffic, Glass Container Manufacturers Institute, dated August 8, 1972.

[101] *Economic and Environmental Analysis of Glass*, pp. 7-19. Estimated capital costs for a 500-ton-per-day raw refuse plant are $200,000 based on the sortex optical separation technique connected to a Black Clawson processing system.

[102] *Ibid.*, p. 3.

[103] *Ibid.*, p. 20.

[104] *Ibid.*, p. 4.

[105] *Loc. cit.*

compete indirectly with cullet are those which compete directly with finished glass products, particularly with glass containers. The most important of these are plastic, steel, and aluminum.[106] While glass has fallen behind metal cans in its share of the beverage container market, it is difficult to discern any overall trend from the data available as to the glass industry's share of its various markets.

There exists the potential in other areas for future increases in cullet usage. The Bureau of Mines has met with considerable success in its experimental fabrication of building bricks using 70-percent crushed glass residue and 30-percent clay.[107] The brick produced by use of a tunnel kiln plant is economically competitive with face brick. Cement blocks utilizing crushed glass as 30 percent of the aggregate have been found to be of superior strength to conventional products. Wall panels fabricated from mixtures of up to 90-percent glass cullet have been found to be exceptionally strong and considerably less expensive than some comparable building materials. Experimental production of spun glass insulation using large percentages of cullet, and terrazzo floors utilizing amber cullet, have produced encouraging results. Substitution of cullet for asphalt aggregates in "glasphalt" paving materials have proven technologically successful (in many ways it is superior to conventional asphalt paving) but economically unfeasible.[108] Finely ground glass is currently being used in reflective highway paints, a use which promises to increase in future, and has been used for some time in the manufacture of abrasives. Flat glass and pressed and blown glass cullet is most frequently ground or powdered and used for match heads and striking abrasives, ammunition, and reflective materials.[109] The total tonnage of glass used in all these products remains relatively small, and these uses do not appear to be on the verge of a dramatic increase.

In sum, although various experimental uses of obsolete cullet have been developed, the area of greatest potential for increasing obsolete cullet recovery remains that of refabricating it into new glass products. One of the major reasons for a low demand for obsolete cullet on the part of glass fabricators is the absence of the "steady, trusted, and reliable source of cullet [which] is needed to give continuity to the production process and batch mixtures."[110]

[106] *Ibid.*, p. 10.

[107] Tyrrell, Miles, et al., *Fabrication and Cost Evaluation of Experimental Building Brick from Waste Glass*, Bureau of Mines Report of Investigations 7605, 1972, pp. 18-33.

[108] *Economic and Environmental Analysis of Glass*, pp. 21-22.

[109] Drobny, N., et al., *Recovery and Utilization of Municipal Solid Waste, Environmental Protection Agency*, 1971, pp. 90-91.

[110] Darnay and Franklin, *op. cit.*, p. 7-15.

This inconsistency or unpredictability of obsolete cullet supplies may be largely attributed to the lack of technological advances necessary for separating, cleaning, and sorting scrap glass. When such improvements are realized, a steady stream of cullet should be forthcoming from our municipal refuse.[111]

Conceivably, transportation rates and costs may make the difference between cullet being recycled or being left in sanitary land fill. While there is little useful information available on average freight costs on raw materials and cullet costs, efforts have been made recently to estimate such figures. The average raw materials cost per ton of glass produced in 1970 was estimated to be $18.43.[112] Of that total, $5.60, or 30.4 percent, represented freight costs. The estimated average cost of a delivered ton of clear cullet was $18.50,[113] in 1970. If that cullet were shipped via rail 397 miles (the average haul in 1969, the latest year for which data are available), the freight charge is estimated to have been $8, or 43.2 percent of its delivered price.[114] The disparity in freight costs relative to delivered prices may have increased since 1970. In Ex Parte No. 265, this Commission granted rate increases of 6 percent on all commodities involved in glass manufacture, including cullet. Rate increases on the same commodities, ranging from 6 percent in the southern territory to 14 percent in the eastern territory, were granted in Ex Parte No. 267. The rate increases under consideration herein, which (as listed in the table below), also limit the increase on collect to 3 percent on southern territory movements, do not appear to have the potential to ameliorate these disparities.

Transportation characteristics of cullet appear to explain only a portion of its disproportionately large freight costs. While cullet and its virgin raw materials counterparts move in similar type cars (open and covered hopper cars, gondolas, and a small number of boxcars), the average weight per carload (52.6 tons) of cullet shipped via rail in 1969, was considerably less than the corresponding weighted average (74.1 tons) for the competing virgin raw materials shipped during the same year.[115] Cullet may be more difficult to handle than its raw materials counterparts; as a result it may be somewhat more expensive to load and unload. It is difficult, however, to determine precisely what portion of the disparity in freight costs may be attributed to these characteristics. Further study of the rail rate

[111] *Economic and Environmental Analysis of Glass*, pp. 7-8.
[112] *Ibid.*, p. 4.
[113] Cullet can be competitive at prices up to 10-percent above virgin raw materials. *Ibid.*, p. 10.
[114] *Ibid.*, p. 12.
[115] *1969 Carload Waybill Statistics*, Department of Transportation Statement TD-1, April 1972.
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structure in this area will be necessary before charges of discrimination can be dealt with in a totally definitive manner.

Some of the most significant data available are those which indicate the portion of purchased cullet (both prompt industrial and obsolete) which moves via rail. In 1967, the latest year for which comparisons are available, approximately 173,231 tons of an estimated total of 600,000 tons of cullet purchased were transported by rail,[1] approximately 29 percent. The disparities in relative freight costs described above means that equal percentage rate increases would result in a greater absolute freight price change (revenue per ton) for cullet than for its equivalent raw materials. The differential increase in freight costs would, in turn, increase the difference between the delivered prices of cullet and its equivalents in cases where cullet is more expensive, and reduce its price advantage in cases where it is not. In the example cited above, cullet was 7 cents more expensive (delivered) than the alternative raw materials. A 6-percent increase in rates would increase the cullet price to $18.98, and would raise the raw materials price to $18.77. The difference of 21 cents, although considerably less than the $1.88 maximum allowable, would nevertheless erode cullet's competitive position, which is presently based on an average 7-cent difference. (Six percent of the proposed increase applicable to most of the relevant movements of these commodities; see the table above.) The actual effect of a rate increase will depend upon how closely industry prices do conform to the estimates cited herein. However, rail rates affect only sightly more than one-fourth of the glass currently recycled. There is no information available at present to indicate what portion of that traffic could be adversely affected by the rate increase proposed but, presumably, some dealers with relatively high costs could find their ability to compete impaired.

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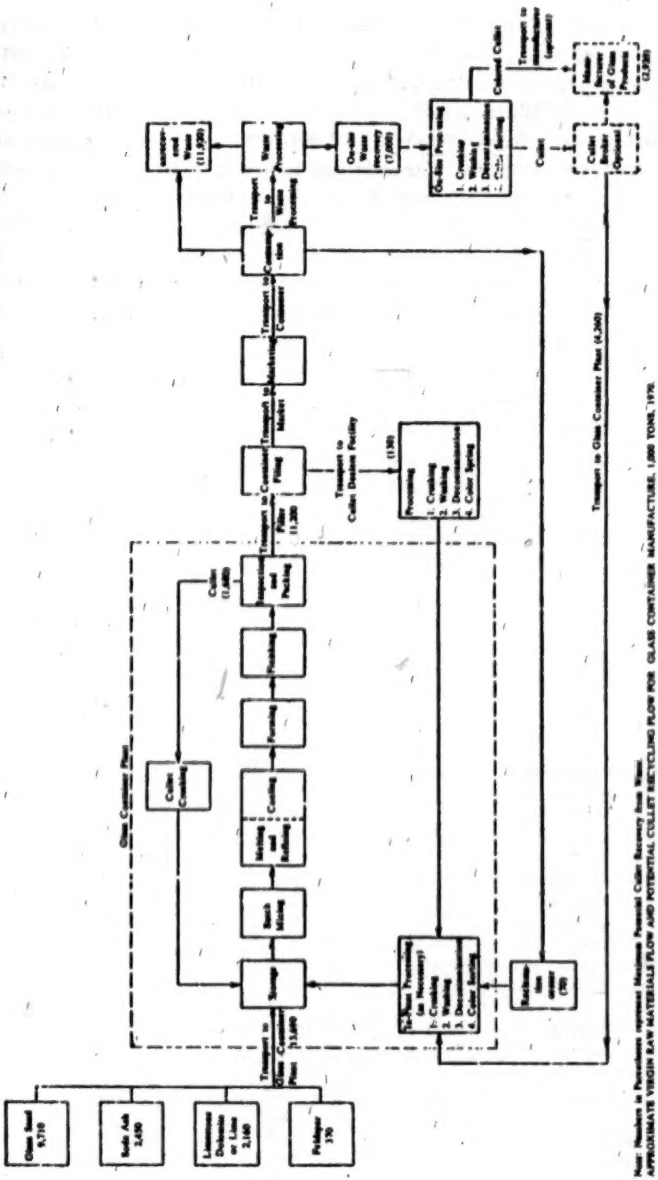
[1] ICC Bureau of Economics' estimate. Tonnage carried via rail was estimated by applying the ratio (by weight) of cullet (STCC 3229924) to all glass and glassware, pressed and blown (STCC 322), carried in 1966 (derived from 1966 Carload Waybill Statistics), to the tonnage of all pressed and blown glass and glassware transported by rail in 1967 (from 1967 Freight Commodity Statistics). The calculation follows: .0861 x 2,007,314 = 173,231 tons. 173,231 tons is the equivalent of 28.9 percent of the 600,000 tons of cullet purchased in 1967.

TABLE

Ex Parte No. 281: Proposed rate increases

Commodity	Proposed increases	Exceptions
Cullet (STCC 3229924)	6 percent	3 percent - To, from, or within Southern Territory
Industrial Sand (STCC 1441310)	6 percent	5 percent - To, from, or within Southern Territory
Dolomitic Limestone (STCC 1421310)	10 percent - To or within Western Territory, or from Western to Eastern Territory.	
Do	5 percent - Within Southern Territory, or from Eastern or Western to Southern Territory	
Do	3 percent - Within Eastern Territory, or from Southern Territory to Eastern Territory	
Soda Ash (STCC 2812322)	6 percent	5 percent - To, from, or within Southern Territory (maximum $.50 per ton) No increase on movements originating in Wyoming.

In summary, it appears that, regardless of the presence or absence of discrimination, a freight rate increase on cullet, accompanied by an equivalent or slightly greater composition rate increase on its raw materials competitors, may occasion an indeterminable decline in purchased cullet consumption, although only a fraction of the cullet market will be affected. We believe that the holddown approved in our prior report to 3 percent is just and reasonable, and responds to the environmental goal of promoting the recycling of these commodities. It is material to note that not one shipper of scrap glass has objected to the approved 3-percent increase. A chart indicating the flow of raw materials and potential cullet recycling follows.


Glass Container Plant
Transport to Glass Container Plant (4,240)
Note: Numbers in Parentheses represent Maximum Potential Cullet Recovery from Waste
APPROXIMATE VIRGIN RAW MATERIALS FLOW AND POTENTIAL CULLET RECYCLING FLOW FOR GLASS CONTAINER MANUFACTURE, 1,000 TONS, 1970

Nonferrous metal scrap.—The nonferrous metal and alloy scrap industry has been granted downward rate adjustments throughout official territory. Incentive rail rates were established in 1963, covering a complete list of nonferrous metal scraps within minimum weights ranging from 40,000 to 80,000 pounds. Effective December 10, 1969, the eastern railroads published a further downward revision in the overall rate levels by establishing 100,000- and 120,000-pound incentive rate scales. These incentive rate scales and the lower rate levels resulted in an average load within official territory of 84,000 pounds on all nonferrous scrap metal, waste, or tailings. The 120,000-pound rate level is relatively the same or below the rate level applicable approximately 9 years ago. In response to protestants' contention that nonferrous metal or alloy scraps are low-value commodities which cannot absorb increases in freight rates, respondents have submitted the following quotations to demonstrate that many scrap metals have increased in price during the past 9 years:

Nonferrous metal scraps New York dealers' buying prices in wholesale lots. (cents per pound)

	Column 1 February 1963	Column 2 December 1971	Column 3 increase or decrease
			Percent
No. 1 heavy copper and wire	24 -24 1/2	33 -34	+38.8
No. 2 heavy copper and wire	22 -22 1/2	29 -30	+33.3
Light copper	19 3/4-20 1/4	27 -28	+38.3
No. 1 composition	20 1/4-20 3/4	29 -30	+44.6
Brass pipe	16 -16 1/2	19 -20	+21.2
Auto radiators (unsweated)	15 1/4-15 3/4	21 -22	+39.7
Cocks and faucets	16 1/2-17	20 -21	+23.5
Heavy yellow brass	14 1/4-14 1/2	18 -19	+31.0
Soft scrap lead	6 -6 1/2	4 -4 1/2	-30.8
Battery lead plate	2 -2 1/2	- 1	-60.0
Clean hand picked type shells	5 1/2- 6	6 - 6 1/2	+8.3
Old zinc	3 - 3 1/4	3 - 3 1/4	----------
New die cast scrap	2 3/4- 3 1/4	3 - 3 1/2	+7.7
New zinc clipping	5 - 5 1/4	6 - 6 1/2	+23.8
Old die cast scrap	1 3/4- 2	2 - 2 1/4	+12.5
Block tin pipe	80 -85	110 -115	+35.3
No. 1 pewter	-60	72 -75	+25.0
No. 1 babbit (high grade)	-40	----------	----------
Solder joints	12 -21 1/2	----------	----------
Pure nickel clips	53 -54	70 -75	+38.9
Rolled nickel anodes	55 -56	75 -85	+51.8

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Nonferrous metal scraps New York dealers' buying prices in wholesale lots (cents per pound)—Continued

	Column 1 February 1963	Column 2 December 1971	Column 3 Increase or decrease
			Percent
Nickel rod ends	53 -54	74 -85	+57.4
Nickel turnings	40 -41	55 -60	+46.3
New monel rods	25 -26	45 -50	+92.3
New monel clips	25 -26	48 -53	+103.8
Monel cast	20 -21	42 -48	+128.6
2S aluminum clippings	9 3/4-10 1/4	7 1/2- 8	-23.8
Old aluminum sheet	7 - 7 1/2	5 1/2- 6	-20.0
Monel sheet	25 -26	42 -48	+84.6
Brass rod ends	----------	25 -26	----------

Nonferrous metal scraps Pittsburgh dealers' buying prices in wholesale lots (cents per pound)

			Percent
No. 1 heavy copper and wire	22 3/4-23	38 -39	+69.6
No. 2 heavy copper and wire	21 -21 1/4	32 -33	+55.3
Light copper	19 -19 1/4	29 -30	+55.8
No. 1 composition	20 1/2-20 3/4	30 -31	+49.4
No. 1 composition turnings	20 -29 1/4	----------	----------
Auto radiators	15 -15 1/4	23 -24	+57.4
Yellow brass	13 -13 1/4	19 -20	+50.9
New brass clippings	17 3/4-18	24 -25	+38.9
No. 1 brass rod turnings	14 1/2-14 3/4	22 -23	+55.9
Aluminum castings	7 1/2- 8	5 1/2- 6 1/2	-18.7
Aluminum borings and turnings	5 1/4- 5 1/2	4 - 5	-9.1
Old zinc	3 - 3 1/4	4 - 5	+53.8
New zinc clippings	5 1/4- 5 1/2	8 - 8 1/2	+54.5
New die cast scrap	3 1/2- 4	3 - 3 1/2	-12.5
Type metal	7 1/2- 7 3/4	9 -10	+32.1
Soft scrap lead	6 1/2- 6 3/4	7 1/2- 8	+18.5
Battery lead plates	- 2	2 - 2 1/4	+12.5
Monel metal	23 -24	23 -24	+95.8
Cocks and faucets	----------	22 -23	----------
New brass clippings	----------	24 -25	----------
Mixed aluminum clips	----------	8 - 9	----------

Source: Secondary raw materials-Publication of the waste trade industry.

Protestants contend that the existing rate structure discriminates against secondary materials in favor of virgin raw materials and that the degree of discrimination has been compounded in recent years by Commission approval of flat percentage increases. Thus, in 1960,

nonferrous scrap metal was charged an average of approximately 13 cents more per hundredweight than the ore of the same metal. The differential today is approximately 18 cents per hundredweight. Freight rates from the South and Southwest to major consuming markets in official territory are now between 1 and 1.5 cents per pound for metal scrap; this represents 2 to 5 percent of the delivered value of copper scrap, 8 to 15 percent of the delivered value of aluminum scrap, and 10 to 20 percent of the delivered value of stainless steel scrap.

Aside from the showing that the railroads have need for additional revenue, the carriers point out that nonferrous metal scrap has considerable value and is in short supply, and thus it is collected and recycled to the full extent. In spite of the fact that those nonferrous metal scrap can afford the rate increases, the railroads have established incentive loading rates, under which the lowest 1972 rates are nearly the same as the lowest 1963 rates. As to NASMI's claim of diversion to motor carriage, the railroads show that between 1966 and 1969, when there were several general rail rate increases, the rail tonnage of waste and scrap material increased by more than 3.8 million tons, while the corresponding figure for motor carriers remained at about 400,000 tons. The railroads point out that NASMI's claim of rate discrimination against nonferrous scrap is in error, since NASMI compared rates per 100 pounds of scrap and ore, and these commodities have different metallic content and transportation characteristics, reflecting differences in the type of equipment required, average loading, and average distance hauled.

The United States produces 15 million tons of scrap metal a year. A 4-percent increase (and only a 3-percent increase has been approved) on these commodities would result in an increase of only 3 cents per hundredweight in the freight rate, which would increase the rate to 68 cents per hundredweight or the same rate that was effective in 1963. We do not find that a 3-percent increase, which will keep rates below a 1963 level, will in any manner slow the movements of the commodities for the purpose of recycling and reclamation.

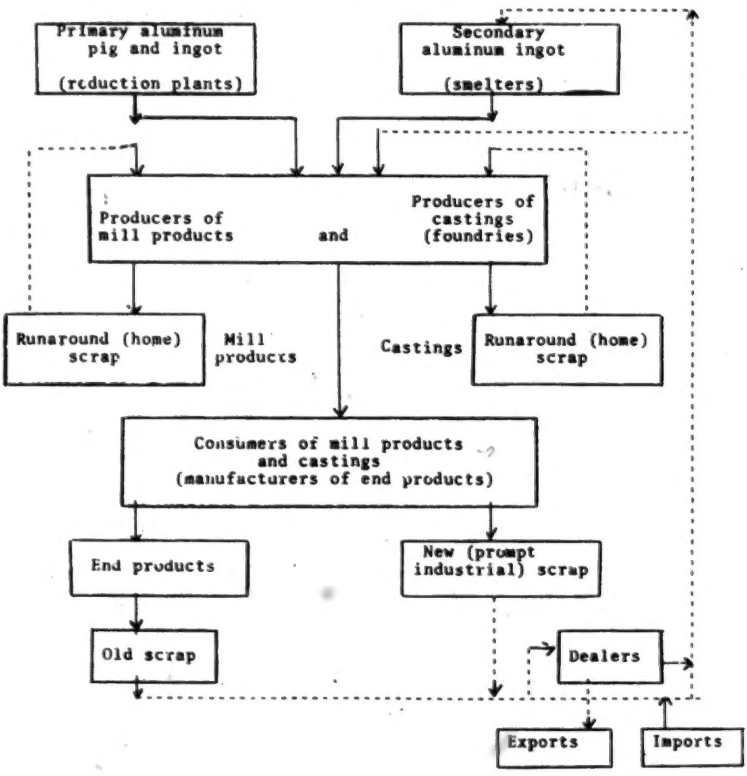
It is worthy of note that aluminum is the only nonferrous metal encountered in municipal waste in significant quantities. About 680,000 tons of aluminun cans, food trays, and packaging foils were part of such waste in 1968.[117] The following flow chart traces the movement of all aluminum scrap. Other nonferrous commodities follow a similar movement. The following map shows the geographic

[117]Darnay and Franklin, *op. cit.*

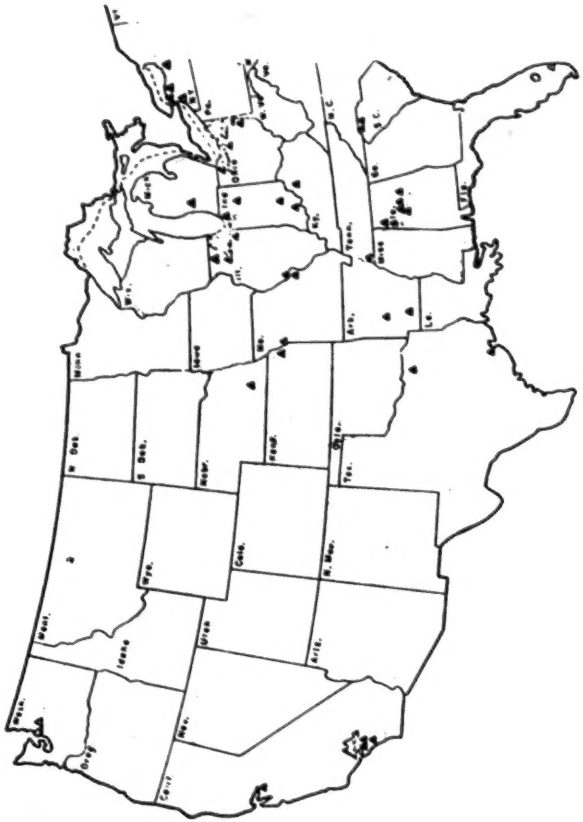
location of secondary aluminum smelters. These locations indicate why it is less economical to recycle aluminum scrap from certain areas of the Nation than it is from others. Again, we believe that this problem is common to most nonferrous scrap materials.

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Flow of aluminum scrap



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Geographic Distribution of Secondary Aluminum Smelters in the United States.

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Plastics—recycling and transportation.—Plastic scrap amounted to 3 percent of all mixed refuse collected in 1968, comprising 1.4 million tons of the total of 193.7 million tons collected in that year.[118] Estimates made in a study done for EPA by Battelle indicate that plastics will compose 3 percent of mixed wastes in 1976, for a total of 11 billion pounds of plastic wastes annually.[119] Production of plastic materials reached 9.35 million tons in 1970, up 2 percent from 1969, and 300 percent from 1960. While the absolute amount of plastic scrap is not insubstantial and promises to grow rapidly in the future, both technological and economic considerations have impeded efforts at recycling this material. There is limited reuse of fabrication wastes, trimmings, chips, et cetera, which may be reused immediately in the fabricating plant or acquired by plastics scrap processors who regrind, color blend, and remelt scrap. These processors frequently operate on a contract basis, returning wastes to the organization which provided them, reformulated into a reusable product. The processed scrap is then used in the manufacture of items not demanding high quality material.[120]

The key to the economic viability of the processing of fabrication wastes, more commonly called "prompt industrial scrap," is the uniformity of quality, type, and cleanliness of the materials involved. Very little, if any, sorting of materials is required. Hence, labor and capital costs are minimized while the consistency and quality of the reusable product are maximized.[121]

These economies do not extend to the processing of "obsolete" plastic scrap: that which is found in collected wastes or recovered from along roadsides and waterways. One authoritative source states that "Once plastics leave fabrication points, they are not recovered *** and there is no recovery from obsolete products."[122] There are a few experimental exceptions. Numerous problems are involved in attempting to recover obsolete plastic scrap. The problems of collecting obsolete plastic scrap are similar to those encountered in the glass industry, the dispersion of sources for the scrap, and the inability economically to separate it from other mixed refuse. The latter is the more critical of the problems, and their solution remains the key to solving the former problems: once it is feasible thoroughly to separate plastics from other solid wastes, collection of the scrap from dispersed points should become economically feasible.

[118] Arsen Darnay and William Franklin, *op. cit.*, p. 9-10.
[119] Drobny, et al., *Recovery and Utilization of Municipal Solid Waste* (Environmental Protection Agency), 1971, p. 91.
[120] Darnay and Franklin, *op. cit.*, p. 9-13.
[121] *Ibid.*, pp. 9-14—16.
[122] *Ibid.*, p. 9-13.

A further barrier to the reclamation of obsolete plastic scrap has been the inadequate technology necessary to clean obsolete plastics and sort them into their types (*e.g.*, polyethylene, PVC, polystyrene), colors, and densities. Research is being pursued in this area by the Bureau of Mines Solid Waste Research Program; and, while the results are promising, there appears to be little hope for widespread employment in the near future of the techniques that have been developed.[123]

Perhaps the greatest stumbling block to the recycling of plastics is the unsatisfactory quality of end products into which they may be transformed. Use of clean waste plastic as a substitute for virgin materials in various refabrication processes (injection molding in particular) has not yielded an acceptable product. Molds injected with obsolete plastic waste fill incompletely and produce products with little, if any, value.[124]

Among the more promising technology becoming available in the field of plastic recovery is that which facilitates the thermochemical recovery of hydrogen chloride gas (HCI) from polyvinyl chloride (PVC), which comprises 20 percent of all plastics produced annualy.[125] PVC waste contains approximately 28-percent HCI, 92-93 percent of which may be recovered easily.[126] No thorough analysis of the costs of processing the PVC for thermochemical recovery of HCI is currently available. As a result, it is difficult, if not impossible, to develop a broad economic view of this recovery process. The Bureau of Mines, however, has calculated that per pound of HCI gas potentially produced, the cost of shipping PVC is less than half that of shipping hydrochloric acid.[127] The Bureau found that railroad freight rates for 100-mile and 500-mile hauls were virtually identical for scrap and virgin PVC materials.[128]

Ford Motor Company researchers have recently developed a process of polymer hydrolysis which has enabled them to recycle polyurethane foam, a major cushioning component in new cars.[129] The use of the foam in the construction of automobiles has increased dramatically from 20 million pounds annually in 1966, to 200 million pounds in 1971; it has also become a correspondingly

[123]Holman, J., et al., *Processing the Plastics from Urban Refuse* (Bureau of Mines Solid Waste Research Program Technical Progress Report 50, February 1972), p. 20.
[124]*Ibid.*, pp. 15-16.
[125]*Ibid.*, pp. 17-19.
[126]*Ibid.*, p. 17.
[127]*Ibid.*, p. 19.
[128]*Ibid.*, p. 19. (Based on rates from St. Louis to Rolla, Mo., and St. Louis to the southwestern United States via St. Louis-San Francisco Ry. Co.)
[129]Zimmer, Mary, "What's Happening to Junk Cars?", *Ford Times*, 65 (August 1972).

larger problem in the disposal of junk automobiles. Burning the foam is usually prohibited, and it does not lend itself to land fill operations. Details of the process and its economic viability have not yet been made public; accordingly, it is impossible to ascertain its economic significance at this point.

Within the near future, the best potential for utilization of obsolete plastic scrap appears to be the recovery of its latent energy by incineration followed by heat recovery. Plastics have the highest BTU value of any material in solid waste and have been successfully consumed by experimental incinerators fueled solely by municipal refuse (mixed solid waste), with power steam generators to produce electric power.[130]

An estimated 2 percent (12,500 tons or 600 carloads) of plastic fabrication wastes were moved by rail in 1970.[131] The remaining 98 percent was either recycled within the plant or transported by motor carriers to and from plastics scrap processors.[132] These data would appear to confirm the views of the plastics recycling industry that railroad freight operations and rates are of minimal importance in the recycling of plastics.

[130]Darnay and Franklin, *op. cit.*, p. 9-17.

[131]ICC Bureau of Economics estimate. Tonnage carried by rail was estimated by applying the ratio (by weight) of plastic scrap to all rubber and plastic scrap carried in 1966 (derived from 1966 carload waybill statistics), to the tonnage of all plastic and rubber scrap transported by rail in 1970 (from 1970 freight commodity statistics). The calculation was as follows: .21 x 59,726 tons = 12,495 tons. Total plastic fabrication wastes for 1970 were estimated on the following basis: only the thermoplastic type of plastic may be remelted and recycled. Of the 9.8 million tons of plastics produced in 1970, a minimum of 70 percent was thermoplastics. Thermoplastics fabrication wastes vary from 5 to 15 percent of production. Using the average fabrication waste estimate (10 percent), we found that a minimum of 7 percent (686,000 tons), of all plastics produced in 1970, are recyclable fabrication wastes. Thereby we arrived at our estimate of the percentage of fabrication wastes moved by rail in 1970 (12,495/686,000 - 1.82 percent).

[132]From interview with James Holman, co-author of *Processing the Plastic from Urban Refuse*.

Proposed Flow Diagram of Processing System for Reclaiming Waste Plastics.

BUREAU OF MINES, PGH., PA. 1972

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The data support the contention of the Society of the Plastics Industry that plastic scrap is recycled principally in-plant and that scrap processors play a relatively insignificant role in the recycling segment of the industry.[133] The practice of thermal recovery of HCl from PVC is not currently widespread in the industry, but, as we have noted, the freight rates for scrap and virgin PVC are reported to be virtually the same. Thus, no indications of current or future rate discrimination are present.[134] Ford's process for recycling polyurethane foam has not yet been employed on anything other than an experimental scale; specific information on transportation need and costs has not yet been gathered. Finally, the incineration of municipal wastes, including plastics, by power steam generating plants currently requires only short-haul motor carrier transportation of refuse, and there is little reason to believe that the transportation needs or modes involved will change within the near future.

On the basis of the 1-percent waybill samples for 1966 and 1969, the average revenue per ton-mile for plastic cellular expanded or foamed scrap or waste (STCC 4026110) fell from 6.0 cents in 1966, to 3.6 cents in 1969, while the number of sample shipments and their average weight and haul increased. The resulting average revenue per ton for these movements rose from $16.86 in 1966, to $21.50 in 1969. Nonexpanded synthetic plastic scrap (STCC 4026135) was found to have paid an average charge of $11.60 per ton for the four shipments sampled in 1966, while in 1969, the average revenue for 13 sampled waybills was $14.08. Because the sample sizes are relatively small, these average rates can only be considered illustrative.

As indicated above, plastic scrap produced during the manufacturing process is reused, but this occurs in the plant creating the waste and is not transported in interstate commerce. The industry has not established markets for municipal solid waste or manufacturing waste not used in the same plant.[135] Recycling programs as described above are being developed, but scrap plastic is of uneven reliability and virgin raw materials are expensive. The NIPCC states that except possibly on a limited basis, plastic fractions obtainable

[133] Letter to ICC from Martin W. Bercovici, attorney for the Society of the Plastics Industry, dated July 28, 1972.

[134] Holman, et al., *op. cit.*, p. 19.

[135] Anthony R. Nollet, President, All-American Environmental Control Corporation, in a March 1, 1972, speech to the Plastic Waste Management Committee.

from the solid-waste stream do not yet appear to be truly subject to recycling at this time.

The plastics industry must attempt to develop practical methods of utlizing plastic found in municipal scrap. The first reported attempt at such a program, using polyethylene milk bottles collected from housewives in the manufacture of drainage tile was halted by Federal regulations requiring that only clean reworked material, generated from the manufacturer's own production may be used. Municipalities may dispose of scrap plastics by fusing them into solids and using this as paving blocks, traffic markers, benches, or parking barriers.

The range of thermoplastic scrap prices in 1969, was from $10 to $110 per ton, depending upon type and form. At the same time, the prices of virgin plastics of the same composition ranged between $225 and $400 per ton. Thus, the incentive to move scrap from many medium to low quality uses could be considered substantial. Obviously, the average charge of 3.6 cents per mile for a ton of expanded plastic scrap, or 5.8 cents per mile per ton for a nonexpanded synthetic, would exert differential economic pressure on scrap movements, depending upon whether the particular scrap was a polyethelene selling at from $10-20 per ton, a polystyrene selling at $40-60, or a polyvinylchloride with a price between $90-110. Equally clear is the fact that rate increases must be looked at in the light of these economic facts and the additional fact that less than 2 percent of all recycled scrap is estimated to move by rail.

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Commodity 4026110 plastic, cellular, expanded, or foamed

Year	Rate type	Number of observations	Revenue/ tons	Revenue/ ton-mile	Revenue/ car-mile	Tons/ cars	Average haul
1966	Interstate	18	18.79	4.0	0.71	19.5	581
	Intrastate	3	5.27	18.1	6.10	31.0	107
	Combined	21	16.86	6.0	1.48	21.1	513
1969	Interstate	29	22.50	3.6	0.67	22.7	695
	Intrastate	2	7.00	3.7	1.05	30.0	195
	Combined	31	21.50	3.6	0.69	23.2	663

Commodity 4026135 synthetic plastic scrap, not cellular, expanded, or foamed

1966	Interstate	3	13.90	3.2	0.77	27.0	517
	Intrastate	1	4.70	35.5	7.10	15.0	10
	Combined	4	11.60	11.3	2.35	24.0	390
1969	Interstate	10	14.53	2.7	0.40	16.0	523
	Intrastate	3	12.57	15.8	2.73	26.7	112
	Combined	13	14.08	5.8	0.94	18.5	428

In conclusion, the recycling of obsolete plastics is currently inhibited largely by technological factors and only marginally by economic parameters. Of those economic parameters, transportation appears to be one of the minor ones. The effects of railroad freight rates in this area of resource recovery are minimal at most.

Fly ash and other industrial ashes.—Fly ash is a waste byproduct of the burning of coal at electric utility plants. The characteristic that distinguishes fly ash from other forms of coal ashes is its fineness. It consists of smooth, glassy particles, a single particle being so fine that it is invisible to the human eye. Chemically it consists principally of silica, iron oxide, alumina, and lime.

Fly ash generated in the United States amounted to 27.1 million tons in 1971, a 2.3-percent increase over the 1970 production. (See the table below entitled Production and Utilization of Ash in the U.S.) Of the total fly ash generated in 1971, 11.8 percent was utilized, in comparison with a 8.3-percent utilization rate in 1970. From 1965 through 1970, the average annual utilization rate was 11.2 percent. (See the table below entitled Ash Collection and Utilization Survey Year 1969.)

Production and Utilization of Ash in the U.S., 1966-1971

AGGREGATES IN MILLIONS OF TONS

Year	Total ash production*	Fly ash production	Fly ash utilized	Percent fly ash utilized of total fly ash production
1966	25.2	17.1	2.0	11.7
1967	27.5	18.4	2.3	12.5
1968	29.6	19.8	2.8	14.1
1969	33.4	21.1	1.9	9.0
1970	31.7	26.5	2.2	8.3
1971	43.0	27.1	3.2	11.8

*Fly ash, boiler slag, and bottom ash.

Source: Edison Electric Institute, Fuel and Ash Subcommittee—Published by National Ash Association.

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Ash collection and utilization survey year 1969

		Fly ash	Bottom ash	Boiler slag (If separated from botton ash)
			Tons	
1.	Total ash collected	21,091,406	7,648,567	2,921,226
2.	Ash utilized			
	a. Mixed with cement clinker or cement (pozzolan cement)	40,701	———	———
	b. Mixed with raw material before forming cement clinker	132,226	5,000	———
	c. Partial replacement of cement in:			
	1. Concrete products	170,450	5,686	———
	2. Structural concrete	176,788	———	———
	3. Dams and other mass concrete	161,874	———	———
	d. Stabilizer for road bases, parking areas, et cetera	148,193	19,417	73,240
	e. Lightweight aggregate	263,564	19,288	———
	f. Fill material for roads, construction sites, et cetera	203,100	1,101,642	548,606
	g. Filler in asphalt mix	110,829	10,084	89,970
	h. Miscellaneous	235,732	522,883	252,262
	Total item # 2	1,643,457	1,684,000	964,078
3.	Ash removed from plantsites at no cost to utility but not covered in categories listed under "Ash Utilization"	284,036	275,900	500
	Total utilized items #2 and #3	1,927,493	1,959,900	964,578

Source: Edison Electric Institute, Fuel and Ash Subcommittee.

Electric utility companies need to dispose of mountains of ash residue that accumulate at coal burning power stations. As with most waste, the alternatives for disposing of this accumulation of ash are becoming more and more restricted. Many utility companies, especially those with plants in urban areas, must have ash hauled great distances, sometimes 70 miles or more, to be dumped. Disposal costs vary from $0.20 to as much as $2.50 per ton, with an average disposal cost of $0.50 per ton (which is estimated as increasing to $1 by 1975).[136] The Potomac Electric Power Company, serving Maryland, Virginia, and the District of Columbia, pays $2 per ton for disposal of its ash by truck. In rural areas, where there is more space for dumping, disposal costs, of course, are considerably lower.

According to industry sources, a major problem in fly ash disposal is educating potential users about its suitability for replacing heavyweight aggregate, the supply of which is declining rapidly in some parts of the country, and the numerous other applications for which ash is a low cost, plentiful, and locally available resource.[137] Despite the potential of fly ash for other purposes, it is now used primarily as an additive. Before it can be marketed, the ash must be tested for its suitability as an admixture. It is important that the ash meet certain chemical and physical requirements. The American Society of Testing Materials, Department of Interior's Bureau of Reclamation, and the U.S. Army Corps of Engineers have developed specifications for the use of fly ash in concrete and other products.

As a recycled material, fly ash currently has the following applications:

1. an additive to cement in concrete and as a raw material or a portion of the kiln feed in the production of cement for dams, masonry block, pipe, and precast units,
2. a mineral filler in bituminous or asphaltic concrete for road surfacing,
3. a raw material in the production of pozzolanic pavement as a stabilizing base for runway and other construction,
4. as a material for the production of lightweight aggregate for processing into lightweight concrete and concrete products,
5. as structural fill for road and other construction (the largest single use), and
6. an abrasive: as oil well grout; a control agent for mine fires and subsidence (sinking) of terrain over abandoned mines; a precipitate in sewage treatment; and a filler or aggregate in asphalt shingles, foundry sand, and chemical products.

Many States permit the use of fly ash in asphalt mixes used for road construction or maintenance. However, present consumption

[136]Estimate of the National Ash Association.

[137]"A Look at the Flyash Picture," a speech by Mr. John Faber, Executive Vice President, National Ash Association, Inc., Washington, D.C.

of this material as an additive is relatively insignificant when compared with its potential. It has been estimated that if fly ash were used as a mineral filler for the eventual resurfacing of all existing bituminuous surfaced roads, almost 300 million tons of ash would be required—about 12 times the current U.S. fly ash annual output.

It is anticipated that the use of fly ash in lightweight aggregate production will increase considerably in the future. The process by which the ash is converted to aggregate, called "sintering," can be performed close to the source of the ash, the aggregate can be stored in open piles, and most of the production probably can be consumed locally. Thus, storage and transportation problems will be minimized, keeping the product costs low and enhancing its advantage over rapidly dewindling natural aggregate sources.

Average Price per Ton, Fly Ash and Substitute—1969*

Sand (construction)	$1.559
Gravel (for cement)	1.887
Crushed stone	1.779
Volcanic ash	1.85**
Fly ash	1.50***

*Prices on commodity as prepared for final use.

**Crude volcanic ash sells at $1.11 per ton. Price range for usable ash in 1968 was from $0.90 to $4.23 depending on form and quality.

***Utility companies sell fly ash at $1.25 per ton. Grading, testing, and storage require additional charges.

Sources: U. S. Department of Labor, Wholesale Prices and Price Index (1969); Bureau of Mines, Mineral Facts and Problems (1970) and Minerals Yearbook (1970); and Walter Handy Company (marketers of fly ash).

Another potentially large use of ash is in the manufacture of bricks, at qualities and prices competitive with clay brick. Researchers at the University of West Virginia have made considerable progress on the use of fly ash and bottom ash in the production of brick. The fly ash brick is composed entirely of the byproduct of pulverized coal furnaces and passes all American Society of Testing Materials requirements for high quality face brick. Cost studies indicate the product may be manufactured at a cost below that of clay brick and marketed at a price to compare with the highest quality clay material. The Nation's need for residential and commercial construction materials can be expected to create a sizable demand for fly ash brick.

Additionally, aerated concrete ("gas" or "foam" concrete) is an application for fly ash which is growing in Europe and may be utilized here. Research on application of fly ash to agricultural uses has also been undertaken and has shown some potential.

Fly ash is purchased from utility companies by dealers primarily in the business of marketing ash products. The prevailing price for fly ash is $1.25 per ton. The ash is then tested to determine its value as an additive or for other uses. The cost of testing and storage increases the price of the fly ash to construction firms and other users.

As is shown in the table entitled Average Price per Ton, Fly Ash and Substitutes—1969, fly ash sold at an average price of $1.50 per ton in 1969, while the prices of substitutes were between $1.56 and $1.89 per ton. These average prices represent a considerable range of actual prices which vary with the quality and form of the material. For example, depending upon the chemical analysis and amount of further processing (sintering, et cetera), the prices for volcanic ash in 1969, for various uses were as follows:

for use as ballast	$0.90 per ton
for road construction	1.20 per ton
as aggregate	2.04 per ton
as an abrasive	4.23 per ton

Portland cement, which is sometimes mentioned as a competitor to fly ash in pozzolanic applications, sold in 1969 for $18.43 per ton. Industry sources indicate, however, that fly ash is used as an additive to Portland cement and really is not a substitute for it.

The amount of fly ash moving by rail is estimated in the next two tables. Rail movements of fly ash in 1970, are estimated to have totaled 371,969 tons, or 16.9 percent of all fly ash utilized as reported by the National Ash Association. However, this rail movement affected only 1.4 percent of the fly ash produced.

The greatest present and potential use for fly ash appears to lie in the construction and building materials industries. These principally are local in nature, i.e., not far removed from the powerplants that are the source of the fly ash; and because there is no showing on this record that too much fly ash is being produced by the utilities to be absorbed locally such use is expected to burgeon independently of rail transport. Accordingly, we find that the increase in the rail freight rates on fly ash which we are authorizing will not significantly affect its movement and, hence, will not significantly affect the environment. It further appears that fly ash movements have

increased although the applicable rates also have risen; and that the railroads require a raise in the applicable fly ash rates in order to maintain and order new covered hopper cars which are necessary to transport fly ash without polluting the air.

Percentage Shares by Commodity for 1-percent Waybill Sample Group Including Fly Ash

Commodity*	Percent of carloads		Percent of tons	
	1966	1969	1966	1969
Fly ash	26.4	28.8	29.5	29.6
Carbon clinker	1.5	0.5	----------	----------
Carbon silica	----------	----------	0.7	0.7
Flue dust	12.4	10.5	16.5	14.8
Mill cinder	59.7	60.2	53.2	54.9
	100.0	100.0	100.0	100.0

*"Coke oven products, not elsewhere classified, STCC 33119."
Source: Developed from I.C.C. Waybill Data for 1966 and 1969.

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Estimate of Total Fly Ash Shipments by Class I Line-Haul Railroads, 1966-1970

Year	"Coke oven products nec," tons originated	Estimated percentage of fly ash	Estimated rail movement of fly ash		
			Tons	Percent of fly ash utilized[C]	Percent of fly ash produced[C]
1966	1,130,542	28.8[A]	325,596	16.3	1.9
1967	961,812	28.8[A]	277,002	12.0	1.5
1968	933,892	28.8[A]	268,961	9.6	1.4
1969	1,125,171	29.6[B]	333,051	17.5	1.6
1970	1,256,652	29.6[B]	371,969	16.9	1.4

[A] Developed from 1-percent waybill sample 1966.
[B] Developed from 1-percent waybill sample 1969.
[C] Developed from National Ash Association data.

Source: Developed from Freight Commodity Statistics, Class I Railroads in the United States, 1966-1970.

Conclusions as to environmental impacts.—It is not enough to find that rates on competing commodities differ or that increases in such rates will disrupt prior relationships.[138] What has been termed a rate advantage actually may be, as seen earlier in this report, an economic advantage inherent in the transportation characteristics of the commodity in question. Scrap generally is less dense than virgin material, it requires considerably more handling effort, and it is tendered in much smaller lots than the raw material, and, therefore, the comparable rates would be expected to be higher for scrap. Waste and scrap materials are characterized by various of these transportation handicaps, and in varying degrees. Technological innovations such as scrap and paper shredders are helping to make the commodities capable of denser loadings, and improve their value, but the scrap industry cannot now approach the transportation advantages held by mines and mills with their regular shipments in multiple-car and trainload lots. Recent rate increases have not substantially affected the use, consumption, or shipping of secondary materials generally, and the selective rate increases here under consideration are also not likely to do so.

Certain environmental and Government groups have advanced the view that we should hold down all increases on materials moving for the purposes of recycling, for environmental reasons. This view is narrow and fails to appreciate any of the other relevant considerations which this Commission must explore in determining the reasonableness and lawfulness of rates. As stated in the 1969 Report of the Citizens Advisory Committee on Environmental Quality—

> For many years environmental considerations have not been given sufficient weight. The pendulum is now swinging to correct this but zeal can drive it too far. Thus, we shall try to take a balanced, practical approach urging action for the environment in the light of reason.

Such a balanced, practical approach is our aim in this proceeding. We conclude, based on all the considerations set forth in this section of our present report, that the approved rate actions will have no significant impact on the quality of our human environment.

II. Unavoidable Adverse Environmental Effects

In this section of our impact statement, the CEQ guidelines require this Commission to examine any probable adverse environmental

[138] Cf. Goodman, *Recent Trends in Transport Rate Regulation*, 70 Mich. L. Rev. 1223 (1972).

effects which cannot be avoided (such as water or air pollution, undesirable land use patterns, damage to life systems, urban congestion, threats to health, or other consequences adverse to the environmental goals set forth in section 101(b) of the NEPA). Based on all available information we do not believe that traffic will be diverted from rail to motor or water carriers as a result of the increases we have approved. Neither does it appear that any recyclable materials are likely not to be moved as a result of our actions. It is expected that the additional transportation costs will be absorbed by either the creator of the waste or the user-industry.

Even if we thought minor diversion from rail to other modes of carriage might occur, we would still be compelled to approve these rate increases because the railroads require these increases to continue to operate in an economic and efficient manner. Failure to approve these selective increases would endanger the continued existence of the railroads, and accordingly, would have a far greater potential adverse effect upon the quality of our environment than any minor diversion from rail carriage that may occur now. The court in *S.C.R.A.P.* v. *United States,* Civil Action No. 971-72, in its opinion filed January 9, 1973, in discussing the possible expansion of its preliminary injunction to commodities other than recyclables, recognized, in part at least, the practicalities of this situation when it concluded that "many railroads are in dire financial straits—some on the verge of bankruptcy—and badly need the revenues now being obtained under the Commission's rate increase."

Our conclusions herein are based on our sound judgment in transportation and those matters which may affect it. The public should be reminded that this Commission's actions are never completely irreversible. If information should be developed at a later date, adequate procedures exist which would permit us to alter our course of action. Based on our extensive examination in this proceeding, however, we do not believe that the involved freight rate increases will significantly affect the movements of freight. The extent to which such increases may impinge upon those movements will, in our opinion, be limited and indirect and represents an unavoidable, albeit highly speculative, consequence of our duty to regulate the surface transportation industry in the public interest. The ultimate effect on the environment will be even more limited and tenuous, and may be more than offset by other factors and alternatives, which are discussed throughout this report.

III. ALTERNATIVES

In responding to the NEPA and CEQ guidelines' admonition that we explore fully the alternatives to the actions we have approved, we need to consider whether they have enlarged our jurisdiction to pass on railroad rate proposals. We find that they have not, but, rather, are further factors that, along with other expressions of public policy, we are obliged to consider in determining whether the carriers' schedules have been shown to be just and reasonable under the Interstate Commerce Act.

As they relate to our activities, the NEPA and the CEQ guidelines require us to take environmental factors into full account in all our planning and decisionmaking. They oblige us to describe in detailed statements the important environmental impact of our major decisions—along with alternatives to such decisions—and to make such assessments public. More particularly, whenever we propose taking a major action with significant environmental impact, we must describe that impact, study and describe alternatives to our action, obtain comments from environmentally expert governmental agencies, and make available to the public, in advance of its effective date, our environmental analysis and the comments of the other agencies. They have not, however, lessened our obligation under the Interstate Commerce Act and, more particularly, the congressionally declared national transportation policy. 49 U.S.C. preceding §1.

We have examined carefully the provisions of the NEPA, as well as its legislative history, and we find in it no congressional expression that we should invalidate railroad rate proposals otherwise shown by the proponents to be just and reasonable under the Interstate Commerce Act. Under the legislative scheme embraced in the Interstate Commerce Act, the initiative for setting their rates resides in the carriers, and we are not to intrude in the exercise of their discretion unless in some particular it offends the terms of that statute. *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U.S. 88, 93 (1913); *Mitchell Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U.S. 247, 259 (1913). "The standards it establishes are transportation standards, not criteria of general welfare." *Texas & Pac. Railway Co.* v. *United States*, 289 U.S. 620, 638 (1933).

That the delegation of authority to invalidate railroad rates and charges otherwise shown by the proponents to be just and reasonable under the Interstate Commerce Act is not to be lightly

inferred, even in the face of congressional enactments strongly suggesting such purpose, was settled in *United States* v. *New York Central Railroad Co.*, 263 U.S. 591 (1924), reversing, *Interchangeable Mileage Ticket Investigation*, 77 I.C.C. 200 (1923); and *Ann Arbor Railroad Co.* v. *United States*, 281 U.S. 658 (1930), reversing, *California Growers' & Shippers' Protective League* v. *S. P. Co.*, 129 I.C.C. 25 (1927). In the former, the Supreme Court held that we had incorrectly construed an amendment requiring the railroads to offer interchangable mileage or scrip coupon tickets, 42 Stat. 827, as indicating an intent that the prices for such tickets be lower than the just and reasonable fares that otherwise obtained. In the latter the Supreme Court held that we incorrectly interpreted the Hoch-Smith Resolution, 43 Stat. 801, as requiring the reduction of the rates and charges on the considered agricultural products below levels previously found to have been shown by the railroads to be just and reasonable under the Interstate Commerce Act. At 281 U.S. 668-669, the Supreme Court, Mr. Justice Van Devanter, said:

> We are of opinion that the Commission's construction cannot be supported. The paragraph does not purport to make any change in the existing law, but on the contrary requires that the law be given effect. Nor does it purport to make unlawful any rate which under the existing law is a lawful rate, but on the contrary leaves the validity of the rate to be tested by that law.
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> [The words of the resolution] fall much short of supporting the construction adopted by the Commission. They are more in the nature of a hopeful characterization of an object deemed desirable if, and in so far as, it may be attainable, than of a rule intended to control rate making. See *United States* v. *New York Central R. R. Co.*, 263 U.S. 603. Of course they should not lightly be disregarded. Neither should they lightly be accepted as overturning positive and unambiguous provisions constituting part of a system of laws reflecting a settled legislative policy, such as the Interstate Commerce Act.***

More recently, during World War II, we were urged by the Administrator of the Office of Price Administration that the Emergency Price Control Act of 1942 and other congressional enactments designed to stabilize prices superseded, at least inferentially, the provisions of the Interstate Commerce Act and imposed upon us an obligation to disallow railroad rate increase proposals otherwise shown to be just and reasonable. In *Increased Railway Rates, Fares, and Charges, 1942*, 255 I.C.C. 357, 392-393 (1943), we said:

We do not agree with this view. At a time when war has imposed unprecedented burdens on the railroads, and has brought them unprecedented earnings, our duty is to determine a rate structure that will meet the requirements of the national transportation policy and the other governing provisions of the Interstate Commerce Act. We recognize the congressional objectives in the Price Control and Stabilization Acts to prevent inflation during the present emergency, and in the administration of those statutes the Director of Economic Stabilization and the Price Administrator will have our cooperation. We are also cognizant of the vital importance of the national transport system in this crisis. Revenues from operations must be sufficient so that mere lack of money may not be the cause of impairment of the transportation system.

* * * * * * *

The Interstate Commerce and the Price Control and Stabilization Acts declare important congressional policies which are not contradictory, but are complementary. In the administration of the Interstate Commerce Act, we give consideration, when applying the standards of lawfulness of charges made under that act, to the fact that for a Nation at war a major problem is to prevent undue inflation of prices. We gave consideration to the relation between the Interstate Commerce and the Price Control and Stabilization Acts in *Increases* in *Texas Rates, Fares, and Charges, supra* [253 I.C.C. 723 (1942)], and we reaffirm the conclusion there reached.

Notwithstanding our disagreement with the Price Administrator as to the relationships of the statutes in question, we acceded to his request on the merits and ordered the removal of surcharges averaging 4.7 percent that we previously had allowed the railroads to collect on movements of freight. We found "that under present conditions, and, so far as we can reasonably foresee, for the remainder of 1943, the revenues received by the railroads, if their freight rates and charges be reduced by the amounts resulting from our previous authorizations of increases in this proceeding will meet the objectives of the national transportation policy as defined in the Interstate Commerce Act, and the standards of section 15a(2) thereof." *Id.*, 255 I.C.C. at 393-394.

As then, we have no doubt that we must consider the merits of the railroads' proposal selectively to increase their rates and charges solely under the provisions of the Interstate Commerce Act. But, as then we recognized the congressional objectives manifested in the stabilization statues to prevent inflation during World War II, so we now recognize the congressional purpose expressed in NEPA to minimize the pollution of the environment and the exploitation of the resources. Our task is to accommodate the policies of NEPA with the principles expressed in the national transportation policy, to give effect to the latter without failing to heed the former. The meshing called for is not unlike what is expected of us in reconciling

the policies of the antitrust laws with the provisions of the Interstate Commerce Act, particularly those authorizing us to approve mergers or consolidations of carriers. In *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 79-80 (1944), the Supreme Court observed:

> ***The Commission's task is to enforce the Interstate Commerce Act and other legislation which deals specifically with transportation facilities and problems. That legislation constitutes the immediate frame of reference within which the Commission operates; and the policies expressed in it must be the basic determinants of its action.
>
> But in executing those policies the Commission may be faced with overlapping and at times inconsistent policies embodied in other legislation enacted at different times and with different problems in view. When this is true, it cannot, without more, ignore the latter. The precise adjustments which it must make, however, will vary from instance to instance depending on the extent to which Congress indicates a desire to have those policies leavened or implemented in the enforcement of the various specific provisions of the legislation with which the Commission is primarily and directly concerned. Cf. *National Broadcasting Co.* v. *United States*, 319 U.S. 190; *New York Central Securities Corp.* v. *United States*, 287 U.S. 12.

See, also, Northern Lines Merger Cases, 396 U.S. 491 (1970); *Penn Central Merger Cases*, 389 U.S. 486 (1968); *Seaboard Air Line R. Co.* v. *United States*, 382 U.S. 154 (1965); Minneapolis & St. L. Ry. Co. v. *United States*, 361 U.S. 173 (1959).

As the Chief Justice said in *Aberdeen R. Co.* v. *SCRAP, supra*, 409 U.S. at 1207:

> The world must go on and new environmental legislation must be carefully meshed with more traditional patterns of federal regulation.

The Interstate Commerce Act and its provisions relating to railroad rates increasingly have been criticized for their alleged insensitivity to, on the one hand, escalating costs incurred by the carriers, and, on the other, the intensifying competition the railroads encounter from other modes; the demand for legislative change at no time recently has been greater. Typical of the critics has been the Council of Economic Advisers, which in its 1972 report put the matter as follows:

> One of the most significant and negative outcomes of regulation has been the fixing of transportation rates in relation to the value of service to shippers, rather than in relation to the costs of providing service. In the early years such value-of-service pricing was a form of price discrimination intended to benefit railroads which operated under conditions approximating monopoly. As competition from other transport modes grew, rail rates substantially above transportation costs for high-valued goods presented attractive competitive targets for motor and water carriers even though the

railroads might have been the low cost carrier of such freight. The process continues today, and as a consequence, the railroads are increasingly the carrier of low-value bulk commodities despite their comparative advantage as to long-haul carrier for general cargo. Through regulations, value-of-service pricing has been imposed on shippers, requiring them to pay rates for services in excess of the costs of those services. This leads to the provision of less transportation services than is desirable for society. In addition, transport pricing unrelated to the costs of providing efficient service causes mislocation of facilities for commerce and industry, which must adjust to existing transportation rate patterns.

This is neither the time nor the occasion to express any disagreement we might have with the stated view of the regulatory framework or the proposals that have been advanced for its amendment. It does bear noting, however, that the suggestion that the rates and charges on recyclable commodities be maintained at depressed levels, with the attendant additional burden that this necessarily would cast on the railroad rates on other commodities, is wholly at odds with the achieving of a cost-related pricing structure. As an abstract proposition it may be no less costly for the railroads to handle recyclable materials than it is for them to transport other freight, and, indeed, elsewhere in this report we noted that the opposite in fact may be the case. For us to attempt, in the circumstances, to hold the rail freight rates and charges on recyclable commodities at depressed levels, upon some theory that it is socially desirable that their movement be encouraged, would cast a burden on the rates and charges applicable on the remaining commodities that the railroads transport or, as some of the parties suggest, the primary materials. In effect, the shippers of such commodities would be asked to underwrite or partially subsidize the transportation of the recyclable commodities. We are not at all convinced that we should impose such a pricing scheme upon the railroads and the shippers they serve, even if, as seems very unlikely, we had the authority to do so.

It seems to us no scientific sin at this point in time to be unable altogether to designate and fully evaluate the potential environmental impacts of policy decisions. In fact, although the current conventional wisdom advocates careful husbanding of natural resources, we are not in possession of any scientific material which specifically enumerates the costs and benefits of recycling versus exploitation of virgin materials. The basic assumptions behind the National Environmental Policy Act of 1969 have not been quantified, and debates continue to rage as to the issues of how fixed any resource actually is, the potential impact of technological revolutions, the revirginization of plant resources, and so forth.

We do know that recycling may be more expensive in terms of direct economic costs than the use of raw materials, and that possible transportation disadvantages are only one item to be considered. Other direct costs involve the preliminary gathering of dispersed waste, its separation by quality or content, the costs of removing and disposing of impurities, and the loss of tax and depletion allowances available for raw material use. In addition to the direct costs, the total social costs of raw versus recycled material use would also include an accounting of the implicit costs of the pollution and depletion involved in each alternative and their capital costs. By assessing the benefits and costs of opposing technologies, a schedule could be drawn up from which policy decisions could be made and beneficiaries identified. Ideally, a rational allocation system would then provide a mechanism whereby the burden of the chosen plan would be equitably shared.

In contrast to such a rational scheme, we are being asked by the protestants to utilize the freight rate structure as a mechanism to allocate the costs of a recycling program when neither the costs nor the benefits have been established. We are asked to accept assertions which have not been rigorously documented, and furthermore to place a very concrete burden upon the railroads and/or other traffic in the form of revenues foregone and/or additional rate increases. Admittedly, the increase would generate only several million dollars in additional freight revenue, but the record has not developed a firm economic case for shifting this burden elsewhere.

It would be in keeping, however, with our previously articulated environmental policy to urge that the railroads make a serious effort to design incentive rates which can facilitate the movement of recyclable commodities. Rates to encourage multiple-carload movements now exist for nonferrous metal scrap. Expanding such rates to include all other scrap materials, and adding rate scales respecting density would encourage movements of well processed scrap and increase its attractiveness as a material source. This alternative should be pursued by the railroads, and we admonish them to do so.

It has been suggested that we impose holddowns on the rates of all secondary materials. In our judgment, such action has not been shown to be warranted solely on environmental grounds, even though certain holddowns have been adopted in this proceeding on the basis of all factors, environmental as well as others. The holddown on scrap iron granted in Ex Parte Nos. 265 and 267 cost

the Penn Central alone about $1 million a year. As we have noted, among the factors causing shippers to shift from rail to motor transportation are service deficiencies. To deny the railroads the increases approved in our prior report would further reduce the quality of service by the railroads and further tend to divert traffic to motor carriage. A rate increase, on the other hand, will provide the railroads with the revenue needed to provide better service. As the court stated in its January 9, 1973, decision in the *S.C.R.A.P.* case, *supra*, "the railroads draw our attention to the obvious fact that it is in their self-interest to request and implement rate increases only where there is no reasonable prospect of diversion to other means of transport. The railroads have as much interest in minimizing diversion as does plaintiff." To meet the railroads' revenue needs by limiting the increases to the rates on nonrecyclable commodities, would tend to raise such rates to the level where they may no longer be just, reasonable, or lawful. This Commission is under a statutory duty to preserve an adequate and economic surface transportation system for the Nation based on a system of just and reasonable rates, and environmental considerations do not by themselves justify special rate treatment for the affected group of commodities. Moreover, we do not believe that further holddowns of rates of all secondary materials or even the reduction of these rates, if it were within our power to compel such, would occasion material increases in the recycling of waste products. Some of the parties suggest that rate holddowns or reductions would encourage the movement of recyclable commodities, and in the abstract we might tend to agree. There is, however, no evidence (and we are unaware of any data) establishing that the consumption of secondary materials would increase significantly if the applicable rates and charges were held down further or reduced.

EPA in its poststatement comments declares that the draft environmental impact statement neglected to consider "[t]he first and most obvious alternative to the proposed general rate increase *** [i.e.]a selective increase based on the evidence of need for increased revenue by the railroad for each commodity concerned." EPA, of course, is quite right; that statement did, indeed, not consider this as an alternative to the actions approved. The suggestion is so far out of line with the fabric of rate regulation in America that the proposal could not have been considered a practical alternative and certainly not the first and most obvious one. Although we do not wish to seem patronizing, we are unable to respond to EPA's suggestion except to reiterate some basics about

transportation regulation in America in the hope that that agency may better understand the role we play and perhaps be more sympathetic to our endeavors to reconcile our responsibilities under the Interstate Commerce Act and those imposed by the National Environmental Policy Act.

We note at the outset that under the pattern of regulation adopted by the Congress the initiative for fashioning the enterprise has been left with the carriers themselves. Whether it be in the area of the railroads' extension or abandonment of lines, their rates and charges, or their finances, the crucial decisions in the first instances are for their managements to make. Ours is a limited role, essentially one of checking entrepreneurial excesses, and not one of second-guessing executive judgments. In short, we regulate the Nation's railroads, we do not control them.

We next would observe that during nearly a century of our regulation the railroads have evolved basically two methods of publishing and filing with us their rates and charges, and these have come to be known by the nature of the proceeding in which they are examined by us, should we deem such action to be indicated upon their being posted—the ordinary rate adjustment or I & S (Investigation and Suspension) proceeding and the general rate case or general revenue proceeding. Although the statutory authority for dealing with the one is identical to that for treating with the other and hence the mechanism under which the one type of case is decided by us is not different from that available for disposing of the other, the two are altogether different in their concept and their purpose, and the distinction between them needs to be kept in mind.

The ordinary rate adjustment or I & S proceeding usually involves the rates and charges upon one or a limited number of commodities, from one or a limited number of origin stations or points to one, or a limited number of destination stations or points proposed by one, or a limited number of railroads seeking an upward or downward rate revision. If ordered for examination by us, the change will need to be justified by the proponent, and its burden of proof ordinarily will embrace the compensativeness of the resultant rates and charges, that is, whether they will cover the variable costs and/or the fully allocated costs of performing the service and, if so, by how much. The proponent's case, moreover, normally will include comparisons with the rates and charges for similar movements such as those that apply on another commodity but one having similar transportation characteristics transported between the origins and destinations in question, all with a view to establishing the essential justness and

reasonableness of the change. In turn, the opponent to the change in the rates and charges, whether it be a competing carrier or an affected shipper, in an ordinary rate adjustment or I & S proceeding normally will counter that the railroad's earnings under the proposal will be inordinately low or unreasonably high and its effect upon the movement of the commodity, competing traffic, the complainant, or the community in which it or another is situated will be unduly preferred or unjustifiably prejudiced, all as the case may be. Our task is to determine whether the railroad has established the justness and reasonableness of the proposed rates and charges and their lawfulness otherwise; and, if we determine that it has not, we may order the proposal canceled, leaving the existing rates and charges intact, or we may prescribe supplanting just and reasonable rates and charges or just and reasonable minima and/or just and reasonable maxima.

The general rate case or general revenue proceeding is altogether different. It ordinarily relates to the rates and charges upon all or most of the commodities from all or most of the origin stations or points to all or most of the destination stations or points proposed by all or most of the railroads, if not throughout the country then most certainly in a large geographic area, such as eastern territory. It almost invariably entails an increase in the level of rates and charges, whether uniformly applied to all of the affected commodities, differentially related to broad groups of items, or subject to holddowns or maxima on specific articles or movements. If ordered for examination by us, the changes will need to be justified by the proponent railroads, and their burden of proof normally is confined to establishing their overall revenue needs. Competing carriers ordinarily do not participate in general rate cases or general revenue proceedings, and the participation of affected shippers by and large is limited to efforts at disproving the railroad's overall revenue needs or attempting to establish that their freight, even without the sought increase, is contributing its fair share towards meeting whatever the railroads' revenue needs may be. Our authorization of the requested increases, or some other increases which we determine to be just and reasonable, in no way is an approval by us of the resultant rates and charges on specific articles and movements. It merely is an indication by us that we are persuaded by the railroads' revenue requirements and that they may increase their rates and charges to the level authorized by us to meet their demonstrated needs for increased revenues. It is for the very reason that our authorization in general rate cases or general

revenue proceeding does not connote or sanction of any particular rate or grup of rates as increased by the railroads that, as we though we had pointed out in ourdraft environmental impact statement, such decisions, unlike those we render in ordinary rate adjustments or I & S proceedings, have not been held to be reviewable by the courts upon complaint of persons believing themselves aggrieved by such rate or rates.

Against this background, the suggestion of EPA that an alternative to our authorizing herein might have been "a selective increase based on the evidence of need for increased revenue by the railroad for each commodity concerned" is revealed to be an altogether impractical one and wholly alien to the establishment of rates and charges in the railroad industry. To require apportionment of railroads' overall revenue needs differentially commodity by commodity, based upon the increased costs incurred in the transportation of each would convert general rate cases or general revenue proceedings into ordinary rate adjustment or I & S proceedings, and the burden thus thrust upon the railroads to cost justify the increased rates and charges upon each of the tens of thousands of commodities they hold themselves out to transport between the hundreds of thousands of pairs of stations or points they stand ready to serve would ensnare the railroads in a morass of calculations from which they never would be able to extract themselves. The whole purpose of general rate cases or general revenue proceedings promptly to enable the railroads to recover increased wage and other costs—without the need for justifying the increases in the rates and charges on specific articles or movements—would be defeated; and the timelag between increased costs and offsetting rate increases that has concerned the carriers and challenged the regulators would become interminable. EPA, EDF, and others have referred in their poststatement comments to certain 1966 and 1969 Burden studies and the estimates developed therein showing, that at the time, the railroads' nationwide earned transportation revenues making a greater contribution towards meeting their variable or fully allocated costs of performing the service from the movement of iron and steel scrap, paper waste and scrap, and other waste and scrap (except ashes) than they did in handling certain corresponding primary materials. Irrespective of what else such comparisons may show, they do not establish an unwarranted disparity in the rail freight rate structure, i.e., that the rail freight rates and charges on secondary materials were inordinately high in relation to those that apply on primary

materials. This Commission has never relied, nor could it legally rely, upon differences in the estimated contribution that applicable rates and charges make towards variable or fully allocated costs as establishing discrimination or preference or prejudice in the rate structure.

Other alternatives suggested by the parties include: (1) directing the railroads to improve their economies of operation, (2) reducing railroad maintenance costs, (3) purchasing more efficient railroad equipment, (4) increasing railroad traffic growth, (5) subsidizing the carriers, and (6) modifying the National Freight Rate Structure. The railroads should be—and so far as this record shows, are—constantly seeking to improve their economies of operation, reduce their maintenance costs, and purchase more efficient equipment.

EPA suggests as an alternative that we "act to reduce the costs of the carriers in lieu of increasing revenues." That agency's poststatement comments are amplified as follows: "The Commission could utilize its powers of regulation to insist on the establishment of more incentive loading rates, more efficient schedules, superior loading methods, shorter handling periods, and the design of more efficient railroad cars." Certainly, we are well aware that the railroad industry has tended to cling to all too many inefficient and uneconomical practices, and we have adopted regulations and issued orders designed to require the carriers to improve their operations particularly with respect to car supply and distribution. We do not believe, however, that we can by the simple pronouncement of new rules and regulations bring about good carrier management or by such rules and regulations provide an alternative to the profit incentive. In other words, we are not prepared to say we can manage the railroads more efficiently and more economically than can the railroads themselves. We continue to have abiding faith in a privately operated system of railroads, unencumbered in its operations by unnecessary impeding regulatory restraints and encouraged by adequate earnings, to make the investments in improved facilities that efficient and economical operations dictate.

In order for rail carriers to continue to operate economically and efficiently, they must be permitted to increase rates to cover their increased costs. The inflationary spiral presently affecting businesses throughout the Nation also affects the rail industry. Not allowing rail carriers to reflect the rising costs in their rates could not, in our considered opinion, be offset by improved economies of operation by the rail carriers. To prevent the rail carriers from

offsetting their rising costs can lead only to a deterioration of available rail services resulting from the deferral of car maintenance and new equipment acquisitions. Any deterioration in rail service may lead to the increased use of motor carrier services and a possible (though not definite) increase in air pollution and highway congestion. In addition, the inability of rail carriers to operate economically may compel the cessation of much, if not all, of their operations; and many commodities which today move by rail, and which may not be efficiently and economically transported by motor carrier, may not be able to move at all.

This Commission cannot grant a subsidy to carriers, for that is a congressional prerogative. As noted above, however, we are required to consider even those alternatives that lie beyond our statutory jurisdiction. It should be made clear, in this connection, that any proposal that the Congress subsidize rail carriers, so that they may transport recyclable materials less expensively, would not enure to the benefit of rail carriers, but rather would in reality benefit the shipper that creates the "waste" in the first instance. The creator of the pollution would be able to move its "waste" less expensively, and every citizen then would be subsidizing these polluters and permitting them to continue creating "waste." We could not possibly withhold needed rate relief from the railroads on the speculative chance that the Congress will enact such legislation.

Congress may wish to approve a governmental subsidy of recycling transportation (another alternative which this Commission cannot enact but which deserves mention), or enact a tax allowance for recycling facilities and the use of recyclable materials (perhaps coupled with a depletion tax on raw materials), or repeal the depletion allowance for exploitation of natural resources which have recyclable substitutes. These fiscal approaches would encourage recycling at public expense, on the assumption that the benefits are equally public, and remove a present encouragement to deplete virgin materials. The funding of Federal subsidies to promote recycling could come in part from a tax imposed on the production of goods for which eventual disposal will be required. The nature of the product market will determine whether the burden falls upon the producer or the consumer of the goods, but at least a part of the potential social burden of the product as an environmental nuisance will be acknowledged in the production process as a direct cost.

As to the last of the suggested alternatives above, we admit that there are imperfections in the National Freight Rate Structure. This

Commission is constantly evaluating this rate structure with an eye towards making it more just and reasonable than it presently appears to be. We believe, and the evidence available to this Commission fails to contradict this belief, that the existing rate structure allows rail carriers to operate with reasonable economy and efficiency and, therefore, to continue to provide those services essential to the transportation of secondary and other materials and necessary to limit the number of trucks on our Nation's highways. The present rate structure considers the position of recyclable materials in the marketplace and does not, in our opinion, unduly hamper the free flow of such materials and no cause exists for postponing the effectiveness of the proposed rate increases on recyclables until the completion of the Ex Parte No. 270 investigation described below.

Long before the matter was raised by the environmental groups, this Commission became concerned about the railroad freight rate structure and more specifically about: (a) the possibly self-defeating nature of general rate increases with respect to generating revenues; (b) disparities and distortions in the basic rate structure; (c) the uneven effects of general increases on individual railroads; and (d) the lack of railroad incentive to improve service in line with shipper requirements. See the preliminary report in Ex Parte No. 270, *Investigation of Railroad Freight Rate Structure*, 340 I.C.C. 868, served November 11, 1971. Our order instituting the investigation in Ex Parte No. 270 was dated December 11, 1970, and it invited all persons having an interest in the subject matter to submit their views or arguments. That order was subsequently served on Federal and all known State and local consumer official and organizations to encourage broader public participation. As we have said in the preliminary report in Ex Parte No. 270 (340 I.C.C. at 880 and 881):

> The economic health and marketing structure of thousands of industries, large and small, rest to varying degrees upon the stability of the transportation rate structure. Drastic changes in that structure should be made only after thorough consideration and evaluation of all the consequences. We, of course, do not regard this system to be above improvement. But, we will want to be reasonably certain that any changes in rate policy resulting from this proceeding, either in administration of the act or in the regulatory laws themselves, will yield substantial public benefits.

To expedite the investigation in Ex Parte No. 270 without compromising the rights of any party, we have adopted modified rules to permit easier presentation of views. Finally, we recognized that prompt completion of the investigation in Ex Parte No. 270 and its companion proceeding, Ex Parte No. 271, *Net Investment—Railroad Rate Base & Rate of Return*, 340 I.C.C. 829 (1971), calls for a

level of research activity far beyond the resources now available within the Commission. Accordingly, we have obtained the necessary funds and have selected a contractor to augment our research resources and to inquire into the following matters:

1. Specification of the Rail Structure and Identification of Changes 1966-present.
2. Determinates of Railroad Pricing.
3. The Economic Impact of Rail Rate Increases. Among other considerations under this heading, the Commission indicated that it is "concerned in the way in which rail rate and service decisions impact on Federal Government programs, such as those dealing with *environmental protection*, urban development, rural economic development, etc." [Emphasis added.]
4. Determination of the Relationship Between Rail Rate and Cost Structures.
5. Examination of Alternative Rate Structures.
6. Examination of the Role of Rate of Return.
7. Railroad Investment Levels and Patterns.
8. Relationship Between Rate Structure and Rate of Return.

It is, therefore, clear that the issue of the possible environmental impact of the rail freight ratesetting process will again be treated in Ex Parte No. 270.[139] Accordingly, all parties interested in pursuing this issue further are invited to participate in that proceeding.

General revenue proceedings, such as the instant one, are concerned with increases in the general rate level and do not pass on the validity of individual rates or groups of rates. If individual rates or groups of rates are believed to be unjust and unreasonable, a shipper or other interested person has an administrative remedy available in sections 13 and 15 of the Interstate Commerce Act, 49 U.S.C. 13 and 15. General revenue proceedings are inappropriate forums for litigating such issues. *Electronic Industries Assn.* v. *United States*, 310 F. Supp. 1286, 1289 (D. D.C. 1970), affirmed mem., 401 U.S. 967 (1971); *Alabama Power Co.* v. *United States*, 316 F. Supp. 337, 338 (D. D.C. 1969), affirmed by a divided court, 400 U.S. 73 (1970); *Algoma Coke & Coal Co.* v. *United States*, 11 F. Supp. 487 (E.D. Va. 1935).

The controversy concerning the proposed rate increases' effect on the recycling of waste and scrap materials is founded on assertions of rate disparities which militate against the movement of wastes in favor of virgin materials. Rates per hundredweight are compared, but with no parallel accounting of the costs attendant upon the comparative movements, and the absolute difference is held to be a

[139] Two split-off proceedings, Sub-No. 1A dealing with rates to and from the Pacific ports and Sub-No. 1B concerning rates to and from Great Lakes ports, have already been the subject of oral hearings, and initial decisions in those matters are expected to be issued within the year.

"rate advantage." The iron and steel scrap industry has gone so far as to make rate comparisons on the basis of assay value claiming that rates should reflect the iron content of the commodity being carried—a "value of service" scheme carried to the extreme.

As we stated in a previous section of this impact statement, however, it is not enough to find that rates on different competing commodities themselves differ. What has been thought to be a "rate" advantage may be in reality an economic advantage inherent in the transportation characteristics of the commodity in question. If scrap is less dense than virgin material, if it requires considerably more handling effort, and if it is tendered in much smaller lots than the raw material, then the comparable rates may well be expected to be higher for scrap. Waste and scrap materials share all these transportation handicaps in varying degrees. While technological scrap-processing innovations help make the commodities capable of denser loadings and improve their value, the scrap industry cannot today participate in the transportation advantages held by mines and mills with their regular shipments in multiple-car and trainload lots.

It would nevertheless be in keeping with our previously articulated environmental policy to urge that the railroads make a serious effort to design incentive rates which can facilitate the movement of recyclable commodities. Rates to encourage multiple-carload movements now exist for nonferrous metal scrap. Expanding such rates to include all other scrap materials, and adding rate scales respecting density would encourage timed movements of well-processed scrap and increase its attractiveness as a material source. This alternative should be pursued by the railroads.

Another alternative considered is the deregulation by this Commission of rates for recyclable materials. S.C.R.A.P. mistakenly contends that this Commission has taken similar action in respect to another socially desirable and price-volatile class of commodities, vegetable produce. It was the Congress, not we, which declared that the truck transportation of agriculture produce should not be subject to economic regulation under part II of the Interstate Commerce Act. However, this applies only to movements by motor vehicle and not to movements by rail. That decision reflecting the judgment of the Congress, was not supported by us. With respect to recyclables, we have utilized the statutory authority we already possess and have simplified in significant ways the process of filing for the necessary interstate motor carrier operating authority to transport on a for-hire basis waste commodities many for recycling purposes. *Transportation of "Waste" Products for Reuse, supra.* This

would appear to be a sufficient encouragement of such transportation.

Federal procurement regulations have increased the use of recycled paper. Such regulations do not apply to other recyclable commodities. We believe that an increased demand for products manufactured from recyclable commodities by Government will result in increased utilization of recyclable commodities. This Commission, therefore, suggests the General Services Administration (GSA), a party to this proceeding, explore the adoption of appropriate regulations which would tend to create the needed demand for such secondary materials. We also urge those other Federal and State agencies participating herein to explore similar procedures.

Darnay, *supra,* suggests that the legislature should even the economic disparity between primary and secondary commodities because of the socio-economic benefits of recycling. While Darnay admits that such legislation would result in higher consumer costs, DOT has offered practical suggestions in furtherance of this view. The Federal Government can offer incentive payments for scrap automobiles, part of which would be paid to the automobile owner; Federal or State authorities could license junkyards; and State and local authorities could provide local disposal sites to prevent motor vehicle abandonment. These ideas go beyond the area of our expertise. It is for Congress, in its wisdom, to determine whether their claimed benefits would be commensurate with their admitted costs.

The League of Women Voters of the United States in a study entitled *Recycle—in Search for New Policies for Resource Recovery* (1972), pp. 25-30, notes that "There is no shortage of proposals about ways to encourage recycling." It suggests that, "New taxes on virgin materials might reduce the price advantage they now enjoy." Such taxes might include so-called deterrent taxes, imposed to limit the use of material by artificially raising its price, and disposal taxes, levied on a product to cover the cost of most efficient disposal under present disposal techniques. As an alternative it proposes that "prices of primary materials could be forced up by reducing or eliminating the capital gains treatment for timber and depletion allowance for minerals." It adds, "Another way is to provide direct subsidies, including price supports, to secondary materials." It recommends the adoption of governmental regulations "to specify recycled materials, whenever applicable, in Government purchases." Of course, we are encouraged to remove

the "disparity" in rates between primary and secondary materials and to set minimum standards for the services that regulated carriers must provide; but the study notes that even in the area of eliminating shipping cost differentials, the responsibility is not ours alone:

> Congress could exercise its powers to ease the transportation inequities faced by shippers of secondary materials. To alleviate the shortage of gondolas Congress could enact legislation to provide some type of financial assistance (loan guarantees, for example) to the railroads for purchase of general purpose railroad cars. Or by Congressional resolution the Congress could state it to be its will that the ICC—through rate-making, service standards, and use of such financial assistance as Congress provided—should facilitate transportation of secondary materials.
>
> The Department of Transportation might be persuaded to take an active interest in the problems of transporting recycled materials. DOT could fund research, enter rate-making cases, and help to establish service criteria.

Finally, EDF, et al., request that we raise the rates on primary commodities because, it is asserted, the transportation charges for hauling primary commodities do not pay the variable costs of the railroads. In the first place, the rates on primary commodities have already been found to be just, reasonable, and lawful; and we, therefore, would have no lawful or statutory basis for raising such rates. Were we arbitrarily to require that such rates be increased without finding them not to be just, reasonable, and lawful—and the railroads were to lose traffic and become unprofitable as a result—then such action might be found to constitute an unconstitutional taking of property without due process of law.[140] Secondly, the Congress has established tax incentives to promote the discovery and utilization of certain primary commodities. For us to take action which would inhibit the movement of those commodities would be inconsistent with one of our national policies established by the Congress and would, therefore, be equally improper.

The problems of waste disposal are pressing and pervasive. The recycling of discarded materials offers the promise of a partial solution. However, effecting such recycling requires the efforts and perhaps the sacrifices of many quarters and not, as has been suggested throughout this proceeding, those of the railroads alone. We have examined the rate structure maintained by the railroads, and we do not find the bias that prefers primary commodities to the

[140] This is particularly true with respect to the Penn Central, Erie Lackawanna, and Reading railroads, now in reorganization, which would have received an estimated $2.1 million in added revenues during 1972 from the increases here authorized.

prejudice of secondary materials that is said to exist. We have examined the methodology and the marketing practices employed in the recycling of waste materials, and we do not find that the railroad rate structure is a significant factor impeding the greater utilization of industrial or municipal trash. We have examined the pertinent increases which we have approved, held to a maximum of no more than 5 percent, and we find that such increases will not significantly affect the quality of the human environment. We have considered the alternatives to our actions, both those that are within our power to accomplish and those that are for the Congress or others to achieve, and we find no warrant for deferring our actions in favor of any of these.

IV. Relationship Between Local Short Term Use of Man's Environment and Enhancement of Long-Term Pproductivity

The available evidence demonstrates that the proposed action will beneficially affect the long-term aims of this Nation in relation to both production and ecology. By allowing rail carriers to adjust their rates to cover increased costs, we are guaranteeing the existence of rail service to future generations. An efficient rail system—one that will be able to endure financial fluctuations and transport all commodities it presently moves in the future—is thereby promoted and retained. This assures future generations of a possible means of keeping highways less congested and a means of controlling air pollution associated therewith. We do not believe that there will be any adverse short term effect upon the quality of the environment by the action proposed herein because it has not been shown, nor does it reasonably appear, that the movements of secondary commodities will be deterred or that any traffic will be diverted from the rails or that the increases permitted herein will affect long-term decisions on investment in scrap-intensive production facilities, such as electric-arc furnaces.

V. Irreversible and Irretrievable Commitments of Resources

There will be no curtailment of the range of beneficial uses of the environment. Our present action will not advance the competitive position of primary resources as opposed to secondary materials and will not add to the pollution of our air. Rather, it will continue the availability of rail service so necessary in our Nation's fight to

improve the quality of the environment and of human life in general.

CONCLUSIONS

In conclusion, we do not believe that the action we take in this proceeding will have a significant adverse impact upon the quality of our human environment. Had we found, however, that our action herein would have some adverse effects upon the environment, it would not preclude our granting the relief sought by the respondents to the extent permitted in this decision. As Senator Jackson has stated: "[subsection 102(c) of NEPA] establishes a procedure designed to insure that in instances where a proposed major Federal action would have a significant impact on the environment, that impact has in fact been considered, that any adverse effects which cannot be avoided are justified by some other *stated* consideration of national policy ***." 115 Cong. Rec. 29055, October 8, 1969 [emphasis added], in this statement. Certainly environmental issues have been identified and have been considered. If there were any significant adverse effects to be found, and we have not discovered any, they are amply justified by the performance of our duties in the public interest in furtherance of the national transportation policy to assure the Nation of an economical and efficient transportation system. This conclusion is in accord with the decision in the *Calvert Cliffs* case, *supra*, which stated that in "some instances environmental costs may outweigh economic and technical benefits and in other instances they may not." We believe that any environmental costs which may be expended as a result of our action in this proceeding are outweighed by the economic benefits derived both by the railroads and by the public that depends upon their services, and the resultant quality of rail service such benefits ensure. We shall continue to keep the transportation of recyclable commodities under surveillance to satisfy ourselves that their movement is not unduly impeded by the applicable railroad rates and charges.

The conclusions and findings of this Commission as set forth in pages 528-530 of our prior report in this proceeding, which report is hereby referred to and made a part hereof, are proper and correct in all material respects and such findings do not require any modification based upon our investigation and conclusions in this report.

This statement is our final environmental impact statement in conformity with the CEQ guidelines. It is being issued prior to the

expiration of the 90-day evaluation period set forth in the CEQ guidelines only after consultation with CEQ and their approval of this procedure. This shortened time frame is required because the suspension period for these rates expires June 7, 1973, and this Commission cannot unilaterally extend that suspension period.

An appropriate order will be entered.

COMMISSIONER BROWN, concurring in part:

In my view, the wisdom of our action in reopening this proceeding for further proceedings and to reconsider the brief and inadequate discussion of environmental issues as contained in the prior report (341 I.C.C. 288), has amply demonstrated itself in the resultant environmental impact statement in the instant report. To the extent that this final environmental impact statement meets the purposes and requirements of Public Law 91-190, National Environmental Policy Act of 1969 (NEPA), as well as the requirements of the Administrative Procedure Act, I join with the majority in the endorsement thereof.

However, I cannot agree with the ultimate conclusion of the report to the effect that approval of increases on recyclable commodities would have no significant impact upon the quality of our human environment, nor to the majority's affirmation of the Commission's conclusions and findings as set forth in pages 528-530 of our prior report in this proceeding. Necessarily, I likewise disagree with certain of the subsidiary findings made throughout the instant report. In my view the report contains an abundance of factual information concerning recyclable commodities, their movement in interstate commerce and the effect thereof upon the quality of human environment, to support both subsidiary and ultimate findings and conclusions adverse to those of the majority. Further, I am of the opinion that the opposite conclusions with respect to the application of rate increases on recyclable commodities should prevail.

My views in this regard are based, in part, upon a reaffirmation of my concurring expression in the prior report. There I stated my considered opinion that denying the rail request for increases on recyclable commodities would, on the whole, have very little effect on overall rail revenues. The majority admits that the increases would generate only a few million dollars in additional freight revenues. Percentagewise the view has been expressed that the proposed increases on recyclables, if taken to the fullest extent possible, would probably not exceed 2 percent of the increased rail revenue sought in this proceeding.

Furthermore, it appears that the railroads themselves have reached the conclusion that the absence of increases on recyclable commodities will have small effect on overall rail revenues. The petition filed January 19, 1973, in Ex Parte No. 292, *Freight Rate Increase—Southern and Western Railroads*, specifically excluded recyclable commodities from the increases sought therein. Likewise, in Ex Parte No. 295, Increased Freight Rates and Charges, 1973, filed April 20, 1973, and pending, the rails again specifically excluded recyclable commodities from the sought increases. Such action may be judged as the trend for the future and represent a realistic attitude by the rail carriers to the extent that rail increases on recyclable commodities in terms of increased rail revenues are not worth the struggle of environmental considerations which they invoke.

One further matter requires comment. The replies to our initial impact statement contained much food for thought. Of particular significance was an alternative suggestion of S.C.R.A.P., EDF, et al., and CEQ to the effect that increases on the rates for recyclables be postponed until the conclusion of our review in Ex Parte No. 270, *Investigation of Railroad Freight Rate Structure*, of the validity of the rate structure. The effect of this proposal is to place a moratorium on rate increases on recyclable commodities for an indefinite period of time. However, in my view the proposal has considerable merit. In Ex Parte No. 270 a definite area of development involves consideration of the way in which our prior rate decisions may have an effect on the Government's program of protecting the environment. Additionally, the study of the rate structure should reveal with much greater precision than presently available the extent, if any, that the movement of recyclable commodities at existing rates would cast a burden upon other forms of traffic. Taken as a whole, such a moratorium without unduly harming rail revenues, may prove to be an intelligent approach to the vexing issues herein.

COMMISSIONER DEASON, dissenting in part:

With respect to the rate increases which the majority would grant herein on recyclable materials, I adhere to my separate expression submitted in the prior report, 341 I.C.C. 288.

COMMISSIONER O'NEAL did not participate.

APPENDIX A

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*** the rate level necessary to move a commodity is an element to be weighed in determining a reasonable rate thereon. *Penick & Ford* v. *Director General*, 80 I.C.C. 152. It is clear fron the more comprehensive record now before us that a large part of the scrap accumulating in the Southwest will not move at the present basis of rates. ***Any basis of rates which discourages traffic in a salable commodity, and results finally in the total loss of a large part of it, is at least open to serious question.

However, we have also recognized that this Commission "cannot require the railroad to maintain rates on a basis which contravenes the act merely because railroads will thereby secure traffic, "*Paper Stock in Official Territory*, 214 I.C.C. 588, 599 (1936). Thus, we have been aware of the problems involved with the utilization of scrap materials for some time and have dealt with claims similar to those raised here by various protestants.[1]

In the more recent general revenue proceedings from 1956 to date, we have discounted the claim that our authorization of the railroads' general rate increases has disadvantaged scrap iron as compared to manufactured iron and steel articles and found that such claim was not established, leaving the final resolution to proceedings defining such issues rather than in general revenue proceedings. Similarly, we have rejected contentions that a general increase will affect the competitive relationship between other waste products and virgin materials. See Ex Parte No. 196, *Increased Freight Rates, 1956*, 298 I.C.C. 279, 341 (1956).

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[1]In numerous cases we have approved or required adjustments in the specific rates on waste products where a violation of the act was involved. See, *e.g.*, *Nat. Assn. of Waste Material Dealers, Inc.*, v. *A. A. R. Co.*, *68 I.C.C. 748 (1922) (fifth-class rating and rates on scrap rubber* found unreasonable to the extent they exceed sixth class); *Waste Materials Dealers Assn.* v. *Chicago R. I. & P. Ry. Co.*, 164 I.C.C. 587 (1930) (scrap iron and steel carload rates to, from and between points in the Southwest found unreasonable to the extent they exceed 15 percent of corresponding first-class rates); *Matthiessen & Hegeler Zinc Co.* v. *Baltimore & O. R. Co.*, 323 I.C.C. 601 (1964) (rates on zinc dross, residue and skimmings found unduly prejudicial and preferential and discrimination ordered removed); *Iron and Steel Articles*, 155 I.C.C. 517 (1929) (basis of maximum reasonable rates prescribed on carloads of iron and steel articles in official territory); *Newport News Shipbuilding & Dry Dock Co. v. B. & O. R. Co.*, 160 I.C.C. 620 (1929) (rates on scrap iron found unreasonable to extent exceed 70 percent of basic scale of rates on iron and steel articles prescribed in *Iron and Steel Articles*, 155 I.C.C. 517). See also cases cited in *Summer & Co.* v. *Chesapeake & O. Ry Co.*, 229 I.C.C. 625 (1956); *Iron and Steel Articles—Eastern Common Carriers*, 68 M.C.C. 717 (1957) (reduced rates on manufactured iron and steel articles to meet truck competition found not unlawful); *Edward Campbell Co.* v. *Reading Co.*, 286 I.C.C. 549, 550 (1952) (rates on slag, a refuse material from removal of iron from iron ore, found unreasonable); see also *Boggs Concrete Products Co.* v. *Atlantic & D. Ry. Co.*, 294 I.C.C. 569, 571 (1955); *Waste Paper From, To, and Between Indiana Points*, 206 I.C.C. 127 (1934) (undue prejudice found where proposed rates to Indiana points were higher than rates to points in Michigan and Illinois); *Wastepaper and Other Articles, Wis. to Wabash, Ind.*, 316 I.C.C. 464 (1962) (initial truckload rates approved); *Scrap Between D. of C. and York, Pa., or Halltown, W. Va.*, 300 I.C.C. 776 (1957) (new motor contract carrier minimum rates on wastepaper, rags, paperboard and scrap metals found lawful); *Rags and Scrap Paper to Lockland and Middletown, Ohio*, 308 I.C.C. 770 (1959) (motor contract rates from 10 States to Ohio points rejected for failure to show they are compensatory); *Miller Waste Mills, Inc.*, v. *Chicago & N. W. Ry. Co.*, 216 I.C.C. 767, 771 (1936) and *Miller Waste Mills, Inc.* v. *Boston & M. R.*, 229 I.C.C. 431 (1938) (rates on cotton waste, cotton sweepings, and waste other than sweepings found unreasonable); *Asbestos Waste from Canada and Vermont to New Orleans*, 248 I.C.C. 143 (1941) (rate reduction found just and reasonable); *Rubber Scrap from Texas to Memphis, Tenn.*, 304 I.C.C. 384 (1958) (reduced truckload rates on scrap tires and scrap rubber order canceled without prejudice to filing new proposals which are compensatory).

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APPENDIX B

Prior Proceedings in Point

Protestants' claim that the rail freight rate structure discriminates against scrap iron and steel and favors competing raw materials is not new. Similar claims have been considered by this agency in the past in both general revenue proceedings and in specific attacks on scrap iron rates as well as other waste products. As long ago at 1922, we found that "[t]he utilization of waste materials is of economic value to the country. ***" *Reduced Rates, 1922*, 68 I.C.C. 676, 720 (1922). Repeating that finding in *Waste Materials Dealers Assn. v. Chicago, R. I. & P. Ry. Co.*, 164 I.C.C. 587, 599 (1930), we additionally found that:

In an interim order not suspending certain rate increases in Ex Parte No. 212, *Increased Freight Rates, 1958*, 302 I.C.C. 665, 695 (1958), we found that total tons of scrap iron originated by the railroads in the United States in 1955 and 1956 were, respectively, 5 million and 7 million tons more than were originated in 1947, indicating that the several general freight rate increases since 1946 had not stifled the movement. We permitted the increases on scrap iron for an interim 7-month suspension period but suspended the rates on scrap paper, rags, and rubber. In a final report after investigation in the same proceeding, reported at 304 I.C.C. 289, 347-349, we found that an increase of 3 percent, maximum 40 cents per ton, will properly relate pig iron and scrap iron materials to the overall adjustment of the rail rates in that proceeding. On scrap paper, rags, and related articles, we rejected the proposed increase of 3 percent, maximum 3 cents per 100 pounds.

In Ex Parte No. 223, *Increased Freight Rates, 1960*, 311 I.C.C. 373 (1960), a scrap iron and steel dealers' association urged that the proposed general increases should not be permitted on scrap iron until a final determination was made in docket No. 33535, *Institute of Scrap Iron and Steel, Inc.* v. *Akron, C. & Y. R.R. Co.*, filed on August 15, 1960, at our earlier invitation in Ex Parte No. 196, *supra*. In docket No. 33535, the Institute alleged that the scrap iron rates in the official territory were unreasonable in violation of section 1, and discriminatory and prejudicial when compared with rates on iron ore, pig iron, and new steel in violation of section 3 of the act. In rejecting this request to delay consideration, we held at (p. 405):

> ***Disposition of the various issues presented in the cited proceeding is not determinative of the instant proceeding involving the equal imposition of flat rate increases on all commodities regardless of other considerations relating to the intrinsic reasonableness rate bases used.

We disagreed with the view that the general increases would perpetuate an unsatisfactory rate structure and permitted increases on scrap iron, pig iron, and other secondary materials.

On April 2, 1962, we dismissed the complaint in the docket No. 33535 proceeding directly attacking the disparities in the rate structure on scrap iron and steel, iron ore, and pig iron. We concluded that such rates were not shown to be unjust, unreasonable, or otherwise unlawful under applicable provisions of the act. That decision, reported at 316 I.C.C. 55, was sustained in *Frank Adams & Co.* v. *United States* (unreported, civil action No. 5093, S.D. Ohio, western division, May 8, 1963), affirmed *per curiam*, 375 U.S. 215 (1963), rehearing denied, 276 U.S. 929 (1964).

We found that the decline in the production of steel in 1958-1959 resulted in a like decline in the consumption of raw materials and in rail carloadings; scrap iron consumption 77.7 percent of 1956-1957 figures, iron ore, 74.4 percent, and pig iron, 76.4 percent. Rail carloadings of all the above aggregated 60.5 percent. Stating figures for a 14-year period we found that "the volume of scrap consumption is closely tied to the volume of production of the steel industry." The relationship of scrap consumption to production has varied only within a narrow range of 52 and 57 percent during the same period. (*Ibid.*, p. 56.)

Comparing scrap prices with steel production by months for the years 1958-1960, we found that changes in scrap prices regularly precede changes in the volume of steel production (*ibid.*, p. 56). We found the price of pig iron has increased steadily since 1944 from $24.17 to approximately $70 in March 1961. Related in terms of percentages using the Bureau of Labor Statistics' price index for July 1960, scrap is

88, or down 12 percent; iron ore 169.7, or up 69.77 percent; pig iron 162.5, or up 62.5 percent; and finish steel 186.7, up 86.7 percent (*ibid.*, p. 57). Meanwhile, the level of scrap iron rates as measured against first-class rates has fallen from 15.2 to 12.8 percent.

We then compared the major differences between scrap and iron ore and pig iron in the movements and distances from origins and destinations, their average weight and loading of shipments, the services employed in transporting each (*ibid.*, pp. 62-63), and found that (*ibid.*, pp. 64-66):

The evidence establishes that while the volume of scrap consumed has varied with changes in the volume of steel production, the relative consumption of scrap has been stable whether measured in relation to total steel production or in relation to the volume of other raw materials consumed. The totals of the tonnage of industry, as reported by the American Iron and Steel Institute, show that for 1959, compared with 1947-49 averages, scrap was the only major raw material that showed an increase in volume consumed. In the same period, consumption of iron ore decreased 11 percent, coal 23 percent, and limestone 36 percent. The tons of scrap consumed per ton of pig iron produced increased 11 percent between 1948 and 1959, while the tons of iron ore decreased 10 percent. Pig iron production in both years was 60 million tons. Thus, of the four basic raw materials entering into the production of steel, scrap is the only one which has not declined in consumption per ingot ton produced. The percentage of scrap to iron ore for 1959 was 47.5 percent, as compared with 43.8 in 1958 and 41.5 in 1957.

Scrap and iron ore are major raw materials in the two separate processes by which steel is produced. Blast furnaces perform a smelting process whereby the iron is separated from the impurities in iron ore. Their primary raw materials are the ore, which provides the metallic content of the product, and coke and limestone, ingredients required to produce the chemical reactions in the furnace. The function of a steelmaking furnace, by contrast, is to refine iron and scrap into steel. The primary ingredients are pig iron and scrap. To those primary raw materials are added the small quantities of iron ore, limestone, and other materials required by the chemistry of the process. Scrap in blast furnaces accounts for less than 2 percent of the total charge and to between 2 and 3 percent of the ore. The scrap thus used consists primarily of home scrap and is of a type that is unsuitable for open hearth use, such as broken skulls, pit and ladle scrap, and other contaminated irons. In steelmaking furnaces, the tonnage is scrap consumed amounts to approximately one-half, whereas the iron ore tonnage amounts to only a small fraction, of the tons of steel produced. Since the two commodities are used largely in different processes, there is small room for competition between them.

While scrap encounters no important competition from iron ore, its use in steelmaking furnaces is, to some extent, alternative to the use of pig iron. For example, in 1959 the percentage of scrap to the total tons of scrap and hot metal amounted to 7.8 percent in bessemer converters, 44.1 percent in open hearths, and 81.6 percent in electric and basic oxygen furnaces. These differences in percentages of scrap consumption are made more meaningful when considered in connection with the relative shares of total steel production by each type of furnace. Of the total production of steel in 1959, bessemer converters contributed 1.5 percent, open hearths 87.8 percent, electric furnaces 8.7 percent, and basic oxygen furnaces 2 percent. Throughout the period 1948-59, the percentages of scrap tons to the total tons of scrap and pig iron consumed in steelmaking furnaces varied from the average for the entire period by no more than 2 percent.

The evidence is conclusive that none of the new processes in steelmaking has had any significant effect upon the proportion of scrap used in the production of steel. The direct charging of iron ore in steelmaking furnaces has been a characteristic of the process throughout its history, and its use in furnaces is not to replace scrap but to supply the oxygen required by the process. The oxygen converter is neither a blast furnace nor an open hearth, but a new type of steelmaking furnace different from either that smelts pig iron and scrap to produce steel.

In 1959, the first year for which separate data for this type of furnace were published by the American Iron and Steel Institute, the total production process amounted to 1,864,338 net tons. In that same year, scrap consumption in steelmaking furnaces amounted to 45,846,896 net tons, equal to 49.7 percent of the 92,175,540 net tons of ingots and castings produced in that year.

The use of oxygen converters has not had any significant effect upon the consumption of scrap by the steel industry. The use of oxygen lances tends to limit the amount of ore charged to open-hearth furnaces. The use of gaseous oxygen has not changed the ratio of scrap to pig iron, and there is no indication that it will do so in the future. Purchased scrap has provided a nearly constant portion of the total scrap consumed by the steel industry, reflecting 1955-59 percentages of 41, 43, 38, 37, and 40, respectively.

Between 1956 and 1959, scrap consumption was on approximately the same level as steel production, and it was iron ore, not scrap, which suffered the decline in consumption during this period. Total steel industry consumption of scrap in 1959, 47.5 percent, was higher in relation to iron ore consumption than in any previous year since 1952.

Finally, we concluded that (*ibid.*, pp. 66-67):

It seems clear that scrap iron has not been at a market disadvantage in comparison with iron ore and pig iron. There is no evidence before us which would suggest that the difficulties testified to by the scrap dealers since 1958 are attributable in any major degree to the rates on iron ore, pig iron, or manufactured iron and steel. The difficulties of the scrap dealers result from the decline in steel production beginning in 1958, and the increasingly severe competition among scrap dealers and brokers.***

There remain for consideration the claims that the present rates on scrap iron are unjust and unreasonable per se. *** As noted, the present scrap rates average 12.8 percent of the basic No. 28300 first-class rates. None of the rates that move traffic, as shown by the defendants' traffic study, is in excess of 21 percent of the first class.***

The rates on scrap iron and on other raw materials of the steel industry have always been made to reflect circumstances and conditions particular to each transportation service. *** An analysis of the short-haul movement in the traffic study shows that out of a total of approximately 4,300 carloads which moved for a short-line distance of 50 miles or less, about 3,200 moved for the account of members of the Institute. The rates at which the traffic moved reflected an average of approximately 10 percent of first class. Many of the rates shown by the complainants are between points where there is no movement. For the most part, the prevailing scrap iron rates at the 8-percent basis are lower than the pig iron rates, despite the fact that pig iron has an 18-percent higher average loading than scrap iron. Moreover, some of the pig iron rates used for comparative purposes have been reduced to meet water competition; for example, the water-competitive rates from Buffalo, N.Y., to Philadelphia and Baltimore, and the water-truck competitive rates from Buffalo to Coatesville and Phoenixville, Pa.

Undue preference and prejudice must be shown by clear and convincing evidence. Substantial similarity and transportation conditions, and a real disadvantage by reason

of the assailed rates, must be shown. Such a showing has not been made on this record. As noted, the transportation characteristics of iron ore, pig iron, manufactured iron and steel, and scrap differ widely. Moreover, there is no justification from a transportation standpoint for requiring a rigid relationship between the rates on scrap and the rates on any of these other commodities.

In Ex Parte No. 256, *Increased Freight Rates, 1967*, 332 I.C.C. 280, 328 (1968), we again considered contentions that increased rates on scrap commodities were not justified. We discussed the two major categories of scrap iron and steel, new processing techniques for scrap and the various types of furnaces used in steelmaking and concluded that the increases on scrap iron and steel should be held to those permitted on iron ore. On other secondary waste and scrap materials (other than ferrous metals), we concluded that the proposed increases are just and reasonable except that rates on scrap paper and rags may not be increased more than 1 cent on shipments of 50,000 pounds or more in the South. (*Ibid.*, pp. 331-333.)

In Ex Parte No. 259, *Increased Freight Rates, 1968*, 332 I.C.C. 714 (1969, as in prior proceedings, protestants called attention to the public interest in removal and utilization of scrap and the importance of maintaining a viable industry dedicated to this task. Upon a more detailed evidentiary presentation, we concluded that justice would be done if scrap iron and pig iron bear the same share of the additional revenues needed by the railroads and limited the increase to the same amount. We commented (*ibid.*, p. 743):

In the steelmaking process both scrap iron and pig iron compete as major components of the charge in the furnace. Integrated steel producers supply their pig iron needs by manufacture within their own complex. The primary component of the charge in the blast furnace, which produces pig iron, is iron ore. A substitute for both pig iron and scrap is high-grade iron ore which has been subjected to other processes which increase its iron content to well over 90 percent. Thus, while the rates on these various commodities are not necessarily related, we are of the opinion that, under current conditions, and where the issues involve the increase in contribution necessary to meet a revenue need, the burden should be imposed in substantially similar fashion. We find that the increases on pig iron and iron and steel scrap, item No. 845 of the master tariff, should not exceed those applied to iron ores, item 1060.

As to the proposed increases on nonferrous scrap of 5 percent, minimum 1 cent per 100 pounds, or 25 cents per ton, net or gross, we found the proposed minimums are patently inconsistent and allowed 1 cent per 100 pounds, 20 cents per net ton, or 22 cents per gross ton (*ibid.*, p. 769).

With respect to rates on other scrap and waste materials, we found the increases would not exceed the maximum level of reasonableness or create an undue burden on this traffic (*ibid.*, p. 771).

In Ex Parte No. 262, *Increased Freight Rates, 1969*, 337 I.C.C. 436 (1970), we rejected the claims that a uniform 6-percent increase discriminates against scrap iron in favor of iron ore and the proposal that the rates on such materials should be made to reflect the relative amount of iron (units) in each. We held (*ibid.*, p. 474):

We find no merit in the Institute's contentions. In the context of the issues in this proceeding we cannot go behind the basic rates in effect November 17, 1969. Moreover, the basic rate structures for iron ore, pig iron, and scrap iron are entirely

unrelated. *Institute of Scrap Iron & Steel, Inc.*, v. *Akron, C. & Y. R.*, 316 I.C.C. 55. As in Ex Parte No. 259, we conclude that, "while the rates on these various commodities are not necessarily related, we are of the opinion that, under current conditions, and where the issues involve the increase in contribution necessary to meet a revenue need, the burden should be imposed in substantially similar fashion." (332 I.C.C. at 743.) The uniform 6-percent increase applied to the basic rates on these commodities will accomplish this purpose. We find no violation of section 2 or 3 in the manner in which the 6-percent increase has been applied on iron ore, pig iron, and scrap iron.

We also rejected claims of discrimination by dealers of other waste and scrap materials, concluding that (*ibid.*, p. 475):

*** attacks on the basic rate structures are beyond the scope of this investigation. There is no probative evidence of record upon which we could find that the 6-percent increase as applied to these commodities has resulted in violation of section 2 or 3.

In Ex Parte Nos. 265 and 267, *Increased Freight Rates, 1970 and 1971*, 339 I.C.C. 125 (1971), we discussed these same issues in terms of the Interstate Commerce Act and the National Environmental Policy Act as well, stating (*ibid.*, pp. 205-211):

Protestants assert that a low-grade commodity such as iron and steel scrap is extremely sensitive to changes in freight rates. Between 1961 and 1966, when there were no general freight rate increases, the price of scrap fluctuated between $24 and $39 per ton. The price of No. 1 heavy melting scrap increased from $27.64 per gross ton in 1967 to $43.50 in 1970, an increase of nearly 60 percent, in spite of the increased freight rates during that same period. The prices of pig iron and iron ore advanced only slightly. In addition, protestant's figures for the ratio of purchased scrap consumed show erratic behavior during those years. The position of purchased scrap improved from 19.9 percent in 1966 to 20.3 percent in 1967, and again to 20.9 percent in 1968, followed by a drop to 19.4 percent in 1969. The only conclusion warranted on this record is that there is little, if any, correlation between rail freight rates and the market for iron and steel scrap. We are not persuaded that rail freight rates on scrap have any material impact on the decisions which result in removal of wrecked automobiles and other scrap metals pursuant to antipollution measures [*ibid.*, p. 205].

Turning to the differences in the transportation service performed in connection with ferrous scrap and iron ore, we rejected the contention that scrap iron and iron ore specifically and directly compete to the extent that they require similar rate treatment finding that (*ibid.*, p. 207):

*** In the light of the demonstrated intervening processing required of ore to transform it into a competing product, we adhere to our conclusions in *Institute of Scrap Iron & Steel, Inc.*, v. *Akron, C. & Y. R.*, 316 I.C.C. 55. In our recent decision in Ex Parte No. 262 we found that a uniform percentage increase applied to the basic rates on both scrap iron and iron ore was equitable to both. We are not persuaded that the competition between these two commodities is so direct as to require any different finding in this proceeding.

Recognizing that NEPA expresses the concern which the Government and the Nation as a whole have with control of activities which result in pollution of the

atmosphere and environment, the possibility that increased freight rates may tend to restrict the movement of scrap iron and other waste materials and thus, indirectly, detract from efforts being made to gather and recycle such materials and the need to encourage the shipment of pollutants, we stated (*ibid.*, pp. 208-209):

It is unnecessary to elaborate upon the importance of the program instituted by the National Environmental Policy Act, or the severity of the problems with which it is concerned. We share that concern and, to the extent that it lies within our statutory authority, propose to assist in the implementation of the objectives of the act. See Transportation of "Waste" Products for Reuse and Recycling, order entered December 21, 1970, Ex Parte No. MC-85. At the same time, we deal with the national need for a viable transportation system, and the constitutional rights of all parties to these proceedings to a full and fair hearing and a decision based upon the evidence of record. The United States Department of Transportation has urged that we approve the freight rate increases as sought without further delay. It asserts that arguments of the protestants to the contrary must be rejected because:

(1) They were submitted before the recommendations of the President's Emergency Board and do not reflect the impact of that recommendation; (2) They make no provision for the cost of complying with the Rail Safety Act of 1970; (3) They assume that long overdue maintenance and necessary capital improvement programs can be funded without regard to deficits in net operating income; (4) They are based on an assumption that the financial problems of weak roads can be selected out for special treatment.

The Department estimates that the railroads' revenue needs as set forth in the ASTRO report are understated; concluding that in the 12-year period from 1969-1980 capital needs will be $44.72 billion or $3.73 billion annually. It notes that even if the railroads actually realize the full amount of the increase sought in this proceeding, the rate of return on investment will remain below desirable levels, and that improvements in service are not free.

As we have found, there is no basis in the evidence for finding that the proposed increase on iron or steel scrap will be detrimental to the antipollution program because of any resulting advantage to the movement of iron ore. There has been demonstrated no price bias against secondary materials due to the application of the rate increases herein proposed. If any such bias exists in the underlying rate structure it should be brought to our attention in the pending rate structure investigation, Ex Parte No. 270, where it can be evaluated on a proper record.

Generally, the scrap and waste materials which we have considered above are produced by particular industries other than the respondents or by the Nation as a whole, i.e., automobiles, cans, et cetera. In large part, the railroad rates on commodities of these types are now at a low level and it is not contended that they produce unreasonable returns for the service performed. It is clear that whenever a commodity is carried at less than fully allocated cost, some other shipper of another commodity must pay the difference if the carrier is to continue in business. We believe that the transportation industry, like all other segments of the economy, must contribute to the control of pollution. The extent and manner in which this is to be accomplished is largely a matter of judgment. Since Ex Parte No. 267 is supported, at least in part by the need for improvement in the respondents' net revenues we believe that some allowance may be made for environmental considerations. Upon consideration of the entire record herein, we conclude that increases in rates and charges herein authorized under Ex Parte No. 267 shall be limited as follows:

On fly ash—the increase shall not exceed 8 percent.
On iron and steel scrap—the increase shall not exceed 11 percent.
On petroleum waste products—the increase shall not exceed 8 percent.
On nonferrous and alloy scrap and textile and paper scrap—the increase shall not exceed 11 percent.

We shall also, in the light of our findings in this and prior cases respecting the propriety of applying equally the increases on scrap iron and steel, pig iron, and iron pellets of high Fe content comparable to scrap iron and steel, require the increases on such commodities to not exceed 11 percent.

In our report in the above proceeding, we discussed petroleum refinery wastes and waste sulfide (*ibid.*, pp. 201-203), secondary materials such as nonferrous metals and alloy scrap, waste paper, rags, and textile waste (pp. 203-204) and fly ash (pp. 204-205). Likewise, although a 15-percent increase was sought on pig iron and iron ore, our findings limited the increase on pig iron and iron pellets having the content comparable to pig iron or scrap iron to not more than 11 percent, the same amount sanctioned for scrap iron and steel, but approved a 12-percent increase on iron ore (*ibid.*, pp. 209, 211, 219).

APPENDIX C

Original Equivalence Formula

Scrap iron		*Iron ore*		*Metallurgical coal*
9,000 pounds (95 percent FE)	=	3,167 pounds (65 percent FE)	+	602 pounds
X		*Rail Share of Total Movement*		X
		X		
Scrap iron		*Iron ore*		*Metallurgical coal*
74 percent		58 percent		65 percent
=		*Rail Shipment Proportion Basis*		=
		=		
Scrap iron		*Iron ore*		*Metallurgical coal*
1,480 pounds		1,837 pounds		391 pounds
X 1.51		*Revised Equivalence Formula* (on gross ton basis)		X 1.51
		X 1.51		
Scrap iron		*Iron ore*		*Metallurgical coal*
2,240 pounds		2,780 pounds		592 pounds

346 I.C.C.

Original Equivalence Formula—Continued

X		*Cost to Transport* X		X
Scrap iron 20.6 cent/hundred-weight.		*Iron ore* 3.2 cent/hundred-weight.		*Metallurgical coal* 14.2 cent/hundredweight
=		*Net Effect Per Ton* =		=
Scrap iron $4.61 Does *Not* Equal		*Iron ore* $2.28	+	*Metallurgical coal* .84

Discrimination = $1.49 per ton of scrap iron ($4.61- ($2.28 + .84))

APPENDIX D

Comments received as to Draft Environmental Impact Statement

Railroads.—The railroad respondents support the determinations made in the draft environmental impact statement by the submission of five verified statements that deal with iron and steel scrap, paper scrap, textile waste, fly ash, and plastic scrap. They assert that those portions of the draft statement dealing with rail rates on iron and steel scrap and the alleged disadvantage under which such scrap was said to be laboring accurately reflect the present situation. It is claimed that the record here convincingly demonstrates that there is no significant relationship between scrap iron and iron ore which could be affected by rail freight rates, and particularly by the limited increases proposed by the rail carriers in this proceeding; and that, as indicated by the following statistical chart, fluctuations in the price of scrap iron and the volume consumed follow month-to-month fluctuations in the production of steel, both here and abroad:

Year	Raw steel production (short tons) (000)	Iron and steel scrap consumption (short tons) (000)	Average price No. 1 heavy melting steel scrap (gross ton)
1970	131,514	86,559	$42.18
1971	120,443	82,567	36.71
1972	133,103	90,476	41.59

Source: Survey of Current Business, February 1973; *American Metals Market*, March 7, 1973 (Pittsburgh prices).

See footnote on following page.

'The same source indicates that the monthly average Pittsburgh prices for No. 1 heavy melting steel scrap were as follows:

		Per ton			Per ton
1972	July	$36.70	1972	November	$40.88
	August	40.15		December	42.29
	September	39.83	1973	January	48.54
	October	38.85		February	49.26

The recent sharp increase is said by the railroads to be due in part to heavy foreign demand at a time when domestic consumption is also strong, citing Senator Saxbe's remarks in the Congressional Record of March 19, 1973.

They point out that the 2.5-percent surcharge which was in effect as to recyclable commodities until mid-July 1972, resulted in an increase in the average scrap iron rate of about 14 cents a ton; that the August 1972 price for scrap iron was up more than $3 a ton over July; and that, with no change in the rail freight rates, the February 1973 price is almost 123 percent of the August level. Respondents conclude that the increases they here propose will have no significant bearing on either the price or use of scrap iron and thus no effect upon the recycling process. They represent that the preponderance of any increase in revenues obtained from the rail transportation of iron and steel scrap would have accrued to the eastern railroads, and they estimate that 70 percent of the estimated $3 million revenue that would have been obtained by the eastern railroads in 1972, would have accrued to the financially troubled Penn Central, Erie Lackawanna, and Reading, all of which are now in reorganization.

The railroads state that "recycling is not the only answer to waste," which refers to the title of an article in Pulp and Paper magazine of February 1973, listing as among the more practical alternatives to recycling: (1) the incineration of waste fiber to produce steam and electric power (an aid to the energy crisis), and (2) the use of wastepaper as fill in the manufacture of a variety of building and construction materials. Respondents state that the gross revenues which the western railroads derived from the transportation of paper wastes and scrap (STCC 4024) increased 23.90 percent to $13,254,072 in 1972, over that derived from such movements in 1967; and that this supports the railroads' contention that rate increases do indeed increase needed revenues and do not divert traffic to any significant extent. They aver that although rail rates on wastepaper have risen consistently over the past 7 years, the value of scrap paper is also up and the use of scrap paper (which has risen to 12 million tons a year currently as compared to 10.27 million tons in 1970), has been constantly increasing. The railroads conclude that this indicates that reasonable rail freight rate increases have little or no effect on the movement of wastepaper, and aver that the incrrased rail revenue is essential to maintain continued availability of rail service to move the scrap paper to recycling points.

By the same token, the railroads assertedly have been tendered increasing amounts of iron and steel scrap in the face of recent freight rate increases, with the gross revenues derived from such transportation by the western railroads increasing $7,042,851 or 18.69 percent for 1972 as compared to 1969. The railroads state that the movement of textile waste has remained relatively steady with a slight increase from 507,854 tons in 1970, to 522,164 tons in 1972, moved by the Southern Railway System and Seaboard Coast Line Railroad, despite rate increases of 5 percent in Ex Parte No. 265 and of 2 cents per hundredweight with a 6-percent maximum in Ex Parte No. 267. They finally indicate that existing motor carrier rates governing the

movement of fly ash appear to be general class rates which are far higher than governing rail rates and that no diversion would occur by permitting the freight rate increases sought herein. As to plastic scrap, it is alleged that the absence of special rates for that commodity in either motor or rail tariffs, and the lack of any proposals to provide reduced rates therefor, indicate (a) that general rate increases, either rail or truck, do not disturb existing movements via either transport mode and (b) that this commodity is moving freely by rail.

General Services Administration of the United States.—GSA represents the civilian executive agencies of the U.S. Government in their role as shippers. In its initial pleadings in this proceeding, GSA opposed the carriers' proposed increases on recyclable commodities, and suggested that these increases be disallowed in whole or in part. In view of the draft environmental impact statement, which GSA commends as an exceptionally thorough exploration of the facts and circumstances surrounding and affecting the transportation of recyclable solid wastes, GSA has modified its position because the facts appear to indicate that the subject rate increases will not significantly or measurably affect the movement of recyclable commodities in many instances.

GSA does not believe that recyclables should be required to bear their full share of the carriers' revenue requirements. It suggests that where it can be determined that reduced rail freight rate levels might reasonably be expected to result in increased recycling of solid wastes, serious consideration should be given to the establishment of rate ceilings on such traffic no lower than the compensatory level. It is asserted that this Commission should not allow a lack of full scientific data to dissuade us from taking affirmative action in those instances where our own analysis indicates that such action could be expected to have beneficial environmental consequences. GSA contends that pollution cannot be alleviated by identifying the creator of the waste and forcing him to bear the economic costs of transporting this waste for reuse. It notes that pollution is a national concern and avers that this Commission has the opportunity in this and similar future proceedings to spread the economic burden associated with recycling through virtually all sectors of the economy, for the meritorious purpose of encouraging the recycling of solid wastes to the benefit of—not any alleged polluters—but the entire economy. GSA does not suggest altering our findings, but merely advocates that we take action to implement the results of our studies in this proceeding by subjecting rates on recyclables to appropriate holddowns where the evidence indicates a beneficial environmental effect would occur.

GSA supports the partial deregulation of the transportation of recyclables because that action assertedly would lower rates. It suggests that this Commission make such a recommendation to the Congress. It maintains that the conclusions expressed in the draft environmental impact statement are inconsistent with the findings therein respecting the movements of individual solid waste materials; that rail freight rate holddowns and/or reductions, no lower than the compensatory level of rates, should be ordered where it is deemed that such actions would substantially benefit the recycling of solid wastes; and that, to the extent found necessary, the costs of such holddowns and reductions be redistributed to other traffic as the Commission and the carriers deem appropriate. GSA finally requests that we continually review the questions in issue in this proceeding for the purpose of making such future changes in our conclusions and actions as the facts and circumstances may warrant.

Students challenging regulatory agency procedures.—S.C.R.A.P. faults this Commission for assertedly failing to consider the environmental impact of the underlying rate structure in this proceeding and for looking only to this impact of

incremental freight rate increases. It is contended that while the harm to the environment from each incremental increase may not be overwhelming, the damage caused by the underlying rate structure, as aggravated by the incremental increase, may very well be significant. It concludes that this Commission does not know what impact the rate structure has. S.C.R.A.P. further avers that we have improperly placed the burden of proving a significant impact upon the environmental interests; and that our draft statement was written to support our prior conclusions and not to inform the public. Finally, S.C.R.A.P. refers to an Environmental Protection Agency Report to Congress on Resources Recovery, dated February 22, 1973, but has not enclosed a copy of that report (which seems not be otherwise available) with its submission.

The Environmental Defense Fund, the National Parks and Conservation Association, and the Izaak Walton League of America.—EDF et al., contend that the draft environmental impact statement issued by this Commission does not provide a sufficiently systematic, objective, and thorough assessment of environmental consequences and alternatives to permit adequate independent evaluation and comment. These parties assert that the draft impact statement is inadequate because it appears to have been written in a spirt of advocacy to serve as justification for a decision which already had been reached by this Commission and because it allegedly does not contain a systematic examination of the effects of the underlying freight rate structure on the shipment and reuse of recyclable waste materials. They accuse this Commission of sitting back, like an umpire, and resolving adversary contentions in a manner held improper in *Calvert Cliffs Coordinating Comm.* v. *Atomic Energy Comm.*, 449 F. 2d 1109, 1119 (D.C. Cir. 1971), and of not developing (or requiring the railroad respondents to develop) the data necessary to resolve the issues herein.

EDF, et al., fault this Commission for failing to conduct a price-sensitivity study without which, it is contended, the impact of freight rate increases on the movement and use of recyclables cannot be gauged, and they offer a specific methodology[1] designed, they say, to estimate the impact of rail freight rates on recycling. It is stated that Commission Burden Studies indicate that scrap commodities contribute more to rail overhead costs than primary commodities, and, therefore, it is concluded that secondary materials are, in effect, subsidizing the transportation of primary commodities. These parties further maintain that demand pricing also leads to the conclusion that scrap rates should be lower than primary material rates. A number of economic dissertations and letters are cited in support of these parties' position.

EDF, et al., request this Commission to consider two alternatives: First, it is requested that we raise the rates for primary commodities, especially in view of the asserted fact that many primary commodities do not even pay their own variable costs. Their second alternative is deregulation of motor carriers to permit them more easily to carry recyclable commodities. It is represented that reducing certificate restrictions might increase recycling.

These environmental interests object to the draft impact statement's characterization of their position and those of other environmental interests in this

[1]That methodology is generally as follows: The first step is to compute the fraction of the cost of each important scrap material which is due to transportation; the second step is to investigate the effect of the price of scrap on the quantity of scrap shipped; and once the first two steps are completed, an estimate of the effect of rate alternatives on recycling can be readily calculated. It is submitted that such an investigation into price-quantity relationships might disabuse this Commission of such "economically senseless notions" as: (1) that scrap and virgin materials do not compete; or (2) that the amount of scrap shipped is somehow independent of the rates charged.

proceeding as impractical and "one-dimensional," and concludes that this statement should be issued as a draft allowing for further comments, public adversary hearings, and cross-examination of Commission staff responsible for its preparation.

Institute of Scrap Iron and Steel, Inc.—The Institute is highly critical of the draft environmental impact statement. It contends that this Commission is determined to treat iron and steel scrap more harshly than other recyclables; that this Commission has adopted the role of the challenger to the Institute and is not acting in the capacity of an objective regulator; and that the draft statement improperly goes beyond the bounds of the record in this proceeding. It seeks cross-examination of this Commission's staff members that aided in the preparation of the draft statement. The Institute maintains that iron ore and scrap cannot be differentiated on the basis of their transportation characteristics (i.e., density, liability to damage, hazard to other commodities, perishability, or liability to spontaneous combustion); that the railroads refuse to pay loss and damage claims on scrap; and that the rate on scrap iron should be 1.5, not 2.5, times higher than the average rate for iron ore simply because the scrap on the average is metallurgically a more valuable commodity. It avers that it seeks a rate preference for scrap and not a rate prejudice against iron ore; and that there can be no diversion to motor carriage in many circumstances because the customers receiving the scrap will accept such shipments only by rail.

The Institute questions the use in the draft statement of sample movements between Baltimore, Md., and Harrisburg, Pa., and alleges that such an example is misleading. It represents that scrap-carrying railroad cars return loads of new steel from the mills, while ore-carrying cars return empty because of their specialized nature. It is argued that no basis exists for this Commission to conclude that a case for discrimination or undue preference has not been made; that the draft statement ignores the costs of operating railroad ore docks; and that it cannot comprehend why the costs of shipping cottonseed and loose cotton are similar, but those for moving iron ore and iron scrap are not. It contends that the draft impact statement erred in comparing ore and scrap irons in many ways including a failure to recognize that only a small portion of the coal charge is for iron ore reduction and that the major segment of the coal charge is for the production of heat. The Institute avers that the draft statement did not, in its opinion, fully and accurately depict the method by which scrap reaches the furnace, while that statement completely and correctly described the ore-movement process.

The Institute points to certain conclusions reached in the draft statement with regard to other recyclables and contends that such conclusions should apply equally to iron and steel scrap. It asserts that the draft statement is contradictory in stating that at most only 30 percent of the charge can be scrap and that it is possible to increase the proportion of scrap in the charge by preheating the scrap before it enters the furnace. It is contended that the railroads lose $1·1 million a year hauling iron ore and earn $25 million a year hauling scrap iron; that this Commission erred in treating scrap iron and pig iron as steelmaking substitutes; and that scrap iron cannot be sold in many natural markets because the freight rate is too high.

The Institute states that due process requires (a) cross-examination of the staff members who prepared the draft statement, (b) that a more complete record be developed, and (c) that a new draft statement be issued for comments. The Institute seeks a holddown to 3 percent as was allegedly accorded all other recyclables.

National Association of Secondary Material Industries, Inc.—NASMI urges this Commission to reject the draft environmental impact statement because it contends that we have proceeded improperly on an *Ex Parte* basis, that we have refused to hold any hearings on the environmental issues, and that certain of NASMI's past

submissions have been ignored. It avers that our draft report is violative of the Administrative Procedure Act because we did not schedule full oral hearings or permit cross-examination of our staff. The association argues that we still have failed to give adequate consideration to the environmental amenities involved; and it cites various bills pending before the Congress which would require this Commission to investigate and cancel all discriminatory and unreasonable rates charged by railroads and motor carriers for the transportation of recyclable materials.

NASMI states that the draft statement overlooks a report dated March 22, 1973 (over a week subsequent to the release of the draft impact statement), issued by the National League of Cities and the United States Conference of Mayors, entitled the "Cities and the Nation's Disposal Crisis"; and that the said report found, in part, that federally approved freight rates and State laws relating to the transportation of solid waste across interstate lines are prime inhibitors of recycling. NASMI declares that the findings in the draft statement herein are contradictory to the Federal Maritime Commission's conclusion in certain draft impact statements which that agency has issued that it (FMC) has reason to believe that the rates charged for the water transportation of recyclables may prevent such commodities from being competitive with primary materials.

NASMI maintains that in the absence of any hearing on the environment, there is no probative evidence of record to support the draft statement's assertion that the existing freight rate structure does not discriminate against recyclables. Finally, the association asserts that the railroads' revenue needs do not afford a valid excuse for this Commission's approval of the proposed rate increases on recyclable commodities.

Copperweld Steel Company.—Copperweld represents that scrap, when molten, can be substituted for molten pig iron smelted from iron ore; and that in periods of low steel production and ready availability of hot metal smelted from iron ore, integrated producers favor hot metal, thereby driving down the price of scrap until it again becomes relatively attractive as a substitute for hot metal. Because freight costs constitute a sizable fraction of the value of scrap (10 to 15 percent of the price on movements of about 100 miles), according to Copperweld, it is imperative that freight rate increases be held comparable to those on iron ore and that the same holddown of 22 cents per gross ton be applied to ferrous scrap as was applied to iron ore. Copperweld states that if the holddown is applied to ferrous scrap rates, the integrated producers will attract scrap from a greater area and in greater quantity, and thereby help to preserve and maintain the environment; and that steelmaking plants having furnances which charge only ferrous scrap will also benefit from the holddown with a resultant beneficial effect upon the quality of the human environment.

United States Department of the Interior.—Interior avers that although the draft environmental impact statement represents an impressive effort on the part of this Commission to indicate the potential effects on the environment of the proposed increase in rail freight rates on commodities moving for the purpose of recycling, the involved statement does not provide a careful multidisciplinary examination of environmental effect. It is contended that freight rate data are not appropriate in an impact statement which should only assess the potential environmental consequences of rate changes on all commodities involved, including recyclable materials; and that the main thrust of the draft statement's discussion is the justification of increased rail freight rates. Interior seeks a definition of "elasticity of demand" as discussed on page 62 of the draft statement and also requests clarification of the relationship between the demand elasticity for rail service and the substitution of truck for rail transportation. It maintains that the discussion of the relative energy efficiencies and

polluting effects of trucks and trains should be expanded in view of the recent interest in energy conservation; and the unique transportation characteristics of ore and scrap that cause rate differentials require further elaboration. Interior also suggests that a table of contents be added to the draft statement; that argumentative material should be deleted; and that draft statement should be restructured. Its presentation incorporates by reference its earlier comments in this proceeding.

United States Department of Commerce.—Commerce suggests according more attention in the final statement to the environmental impact (together with in-depth supporting documentation) and less to justifying a contemplated ratemaking action. The Department recognizes the importance of maintaining an efficient and reliable railroad system, but questions whether this objective will be jeopardized by holddowns on rail freight rates for secondary materials. It avers that the national concern for conserving limited natural resources requires that transportation rates be structured, insofar as possible, so that there is no economic disincentive for moving secondary materials; that the general discussion of classification factors or transportation characteristics could be strengthened by showing specifically how and to what extent each of the factors listed applies to the transportation of scrap material; and that the nature of elasticity of demand should be clarified. It suggests that we should present in greater detail the cost-and-demand implications of a rate structure that would be designed to favor the shipment of secondary materials by rail. The Department urges us to go forward as rapidly as possible with the examination of the rate structure now under way in Ex Parte No. 270.

The Council on Environmental Quality.—CEQ agrees that the mere existence of rate differences does not imply rate discrimination, but asserts that the draft impact statement does not demonstrate that these differentials are justified by inherent cost differences or other factors. The Council states that the draft statement fails to consider how freight rates might affect longrun decisions on investment in scrap-intensive production facilities, such as electric-arc furnances; and it finds it difficult to believe that the economic well-being of the Nation's railroads is at stake in this proceeding. CEQ does not understand why this Commission cannot design incentive rates for recycling. Because of the time limitations present in this proceeding, the Council states that it might be desirable to deal with these questions in Ex Parte No. 270, if rate increases on recyclables were postponed until that time. CEQ finally commends the effort made in assembling the draft impact statement and expresses its hope that the deficiencies identified by the commenting parties will be carefully considered in preparing the final statement and in evaluating and selecting among possible alternative actions.

United States Environmental Protection Agency.—EPA has classified the draft environmental impact statement as Category 3—Inadequate. It asserts that the draft statement does not adequately assess the environmental impact of the proposed freight rate increases on the movement of secondary materials; and that it does not consider in reasonable detail the range of alternatives to the proposed action. EPA recognizes that the railroads need increased revenues to cover increased operating costs, and it acknowledges that the environmental damages that might result from a small rate increase for secondary materials would in fact be small. Nevertheless, EPA believes that there is evidence to indicate that the present rate structure discriminates against the movement of secondary materials, and that the proposed action would further distort this rate structure and when combined with past increases could have significant, though admittedly difficult to predict, environmental ramifications. It, therefore, maintains that alternatives to the proposed action that would have resulted

in a more equitable rate structure (such as cost-based increases for particular materials) should have been analyzed more thoroughly.

EPA contends that basic economics dictate that some difficult-to-estimate decrease in recycling will result because of freight rate increases for secondary materials; that a reduction in the use of recyclables will have an adverse environmental effect because recycling may also result in a reduction in strip mining, conservation of forests and nonrenewable resources, and a reduction in the muncipal solid waste disposal burden; and that in order to justify rate increases for recyclables this Commission should demonstrate that such increases are necessary to offset increased costs to the carriers of shipping *these* commodities.

EPA states that a Department of Transportation 1969 Burden Study shows that some secondary materials contribute more revenue over cost than do virgin materials. EPA notes that this study indicates that the average ratio of revenues to fully allocated costs for iron ore are less than 1 (.95), indicating that such traffic contributes less than its proportional share to the burden of constant cost. The same ratio expressed for iron and steel scrap is said in the same study to be greater than 1 (1.22), indicating that the secondary traffic is carrying more than its proportional share of the burden of constant cost. EPA avers that the same ratios applied to variable costs indicate a 12-percent greater burden for scrap than for iron ore. It concludes that if the present rate structure discriminates against secondary materials then the rail freight rate increase here under consideration would act to amplify negative environmental impacts.

As to the evaluation of various alternatives to the proposed action embodied in the draft statement, which EPA characterizes as cursory and not in accord with the spirit of NEPA, it points out that the first and most obvious alternative to the proposed general rate increase is a selective increase based on the evidence of need for increased revenue by the railroads for each concerned commodity and that a second alternative would be for this Commission to act to reduce the cost of the carriers in lieu of increasing revenues. It suggests that cost factors do not require an increase in the rates on recyclables and proposes that we insist on the establishment of more incentive loading rates, more efficient schedules, superior loading methods, shorter handling periods, and the design of more efficient railroad cars.

EPA believes that the cost information cited in the draft statement in regard to scrap iron and steel is insufficient to support a higher percentage rate increase for scrap iron and steel than for other secondary materials; and that this Commission is in a unique position to obtain the necessary cost information from the carriers to determine if transportation rates for virgin and secondary materials are equitable on a cost basis. It avers that the analysis of the glass industry set forth in the draft statement concluded that an increase in the transportation charges may occasion an indeterminable decline in purchased cullet consumption; and that notwithstanding this conclusion, a 3-percent increase on cullet was approved. EPA contends that this Commission has failed to address the environmental impacts of increased freight rates on returnable containers.

EPA concludes that any economic factor that increases the cost of a product must have an impact on its marginal consumption patterns and, more significantly, on long-term investment decisionmaking; and that in order to demonstrate either the absence or negligible magnitude of environmental consequences of the proposed action, this Commission should provide quantitative data showing the degree to which the consumption of each secondary material for which a rate increase has been proposed would decline with the proposed increase.

APPENDIX E

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INTERSTATE COMMERCE COMMISSION

Service Date
March 13, 1973

EX PARTE No. 281

Increased Freight Rates and Charges, 1972
(Environmental Matters)

Summary Sheet
Accompanying Draft Environmental
Impact Statement

1. *Name of action:* Ex Parte No. 281, Increased Freight Rates and Charges—Administrative Action.

2. *Brief description of action:* Authorization for increases in railroad rates and charges on commodities moving for purposes of recycling, as more fully set forth in the report of the Commission of September 27, 1972, 341 I.C.C. 288.

3. *Summary of environmental impact:* The increases authorized are found not to have a significant effect upon the quality of the human environment, as more fully detailed in the draft environmental impact statement.

4. *List alternatives considered:* The report outlines the several alternatives, both within the power of the Commission to accomplish and those requiring the actions of the Congress and others to achieve, such as revision of the tax structure to encourage the use of secondary, rather than primary materials.

5. Comments upon the draft environmental impact statement are requested from the following: Council on Environmental Quality, Environmental Protection Agency, Department of Commerce, Department of Interior, Department of Transportation and all other Federal, state and local agencies having familarity with the subject matter.

6. Comments are requested within thirty days from the date of service of the draft report, and the final agency action is contemplated to become effective on June 7, 1973.

INTERSTATE COMMERCE COMMISSION

EX PARTE No. 281

Increased Freight Rates and Charges, 1972
(Environmental Matters)

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Decided March 5, 1973

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1. On further proceedings, the National Environmental Policy Act of 1969 (49 U.S.C. 4321 *et seq.*) construed and applied, and a draft environmental impact statement issued. Upon consideration of the prior report in this proceeding (341 I.C.C. 288) and of certain selective increases in rail freight rates and charges on the movements of commodities being transported for the purposes of recycling (which increases were found in the prior report to be just, reasonable, and otherwise lawful) and the quantifiable and other effects of such increases upon the quality of our human environment, found:

a. That such selective rail freight rate increases, when considered in the light of historic and prevailing rate relationships, transport patterns, and the infinite variety of technological and other variables discussed in this report, are not likely to have a significant impact upon the involved traffic by rail.

b. That any probable adverse environmental effects which cannot be avoided, when balanced against other stated public policy purposes, the lack of probability that the proposed rail rate increases will have a significant adverse environmental effect, and the environmental benefits to be insured by the maintenance of an efficient and reliable railroad system, are not significant.

c. That upon a rigorous exploration and objective evaluation of possible alternatives, the proposed action found

to have less detrimental effects upon the environment than other reasonable alternatives.

d. That future generations will be assured of the availability of an efficient railroad system and its inherent environmental advantages, and that there is no potentially significant short-term effect upon the quality of the environment because the movements of secondary commodities will not be deterred and such traffic will not be diverted from the railroads.

e. That there is likely to be no irreversible and irretrievable commitments of resources.

2. Comments concerning the provisional findings and conclusions expressed in this report requested from any interested persons within 30 days from the date of service of this report.

Appearances as noted in the prior report.

Ex Parte No. 281

Report of The Commission on Further Proceedings

By The Commission:

We have reopened this proceeding for the purpose of further evaluating, in accordance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, the environmental effects of the increases we have authorized in the railroad freight rates and charges on movements of commodities being transported for the purposes of recycling. This report embodies our provisional findings and conclusions regarding the potential environmental impact of those selective increases found in our prior report and order (341 I.C.C. 288) to be just, reasonable, and otherwise lawful. We solicit the comments and views of all interested persons as to this draft environmental impact statement, so that a final statement may be issued wihout undue delay.

Background

This investigation into the adequacy of nationwide railroad freight rates and charges was instituted, following the filing of petitions by certain railroads and connecting water and motor carriers, by report and orders of this Commission entered December 21, 1971 (340 I.C.C. 358). We noted in that report, which also denied petitioners' request for authority to establish an interim surcharge on certain bills for freight charges on less than statutory notice, that the carriers had failed to submit a statement with their petitions regarding the environmental impact of their proposal as contemplated by the NEPA. We directed the petitioners to file and serve an environmental impact statement within 10 days from the date of service of those orders, and they responded on January 3, 1972. Our December report and orders were served on all parties to Ex Parte Nos. 265 and 267, *Increased Freight Rates, 1970 and 1971*, 339 I.C.C. 125 (1971),[1] and on all known consumer and environmental in-

[1] This included service on Students Challenging Regulatory Agency Procedures (S.C.R.A.P.). One of that group's principal arguments, before this Commission as well as in the U.S. District Court for the District of Columbia (*Students Challenging Regulatory Agency Procedures (S.C.R.A.P.) and Coun-*

terests. The orders also were published in the Federal Register. As a consequence, all persons interested in the environmental issues have received due notice of our intention to consider such issues and have been accorded every opportunity to participate at all stages of this proceeding.

By order entered February 1, 1972, it was found that approval of the request by the nation's railroads to impose a 2.5 percent emergency surcharge on all freight shipments beginning February 5, 1972,[2] would appear to have no significant effect either on the movement of traffic by rail or on the quality of the human environment within the meaning of the NEPA. In approving that temporary increase (then conditioned to expire on June 5, 1972), we further concluded, among other things, that the railroads have a critical need for additional revenue to offset, in part, recently incurred increases in their operating costs.

By order dated March 1, 1972, and served March 6, 1972, a draft environmental impact statement (a copy of which is reproduced as Appendix C to the report entered September 27, 1972, *Increased Freight Rates and Charges, 1972*, 341 I.C.C. 288, at 551), was served on all parties to this proceeding and on other governmental agencies [including the Council on Environmental Quality (CEQ), Environmental Protection Agency (EPA), and the Office of Environmental and Urban Systems, Department of Transportation] which might have an interest in that matter. Thereafter, the United States District Court for the District of Columbia enjoined the collection of the 2.5 percent interim surcharge on goods being transported for purposes of recycling after July 15, 1972, because it found that in declining to suspend

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cil on Environmental Quality v. *United States of America and the Interstate Commerce Commission*, D. D.C., 340 F. Supp. 189 (1972), referred to later in this report) had been that the increases violated the terms of NEPA and were therefore invalid. S.C.R.A.P. also argued that this Commission should order a refund of moneys paid under these invalid rates, and "suspend consideration of any additional or further requests for freight rate increases by the nation's railroads, pending a hearing" on S.C.R.A.P.'s contention.

[2] We had earlier denied, by order entered January 7, 1972, a petition filed December 20, 1971, by S.C.R.A.P., seeking a two-week extension of time beyond January 20, 1972, for filing protests against the proposed surcharge and an additional two-week extension of the date (February 5, 1972) on which such surcharge was to become effective.

the temporary surcharge we had failed to give adequate consideration to the environmental amenities.[3] That statement, it bears noting here, recognized that we would need more evidence to enable us to assess the potential environmental impact of the selective increases. In our report of September 27, 1972, *Increased Freight Rates and Charges, 1972, supra*, we stated that, based on our analysis of the increases proposed within particular commodity groups and of recent general increases in railroad freight rates and charges, we anticipated that authorizations would not substantially affect the use, consumption, or shipping of secondary materials, and that the increases at the levels authorized would neither actually nor potentially significantly affect the quality of our human environment. We concluded that a likely result of the overall limitation and the specific holddowns which we provided would be encourage the movement of recyclable commodities. As we had considered the environmental issues fully, we thought no formal impact statement was necessary.

Petitions[4] were filed objecting to our decision not to issue a formal impact statement and seeking reconsideration of our discussion of the environmental impact of increased rail rates and charges on the movements of commodities being transported for the purposes of recycling. By order of November 7, 1972, we reopened this proceeding in order further to evaluate the environmental effects of increased railroad freight rates and charges on the movements of commodities being transported for the purposes of recycling as defined in paragraph (m) to the General

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[3] *S.C.R.A.P.* v. *United States, supra.* On July 19, 1972, in *Aberdeen R. Co.* v. *S.C.R.A.P.*, — U.S. —, 93 S. Ct. 1 (1972), Chief Justice Burger, acting as Circuit Justice for the District of Columbia Circuit, denied an application for a stay of the District Court's judgment pending appeal. While expressing grave reservations regarding the decision of the lower court, he concluded that, on balance, the District Court did not abuse its discretion in deciding "that there was danger to the environment outweighing the loss of income and consequent financial threat to the railroads." This matter is now on appeal to the Supreme Court which has noted probable jurisdiction.

[4] Petitions were filed individually by S.C.R.A.P., CEQ, EPA, the Institute of Scrap Iron & Steel, Inc., National Association of Secondary Materials Industries, Inc., Northwestern Steel and Wire Company, Copperweld Steel Company, and the Environmental Defense Fund.

Exceptions to the Tariff of Increased Rates and Charges X-281-B.[5]

The United States District Court for the District of Columbia by order filed January 9, 1973, declined to enjoin preliminarily the increases we approved on commodities other than those being transported for the purposes of recycling. The court stated that its decision was influenced, in part, by the substantial and irreparable harm to the Nation's railroads that the injunction might cause.

Our draft statement herein reflects our effort to satisfy the requirements of NEPA. We have exhausted every reasonable method of examination to assure concerned citizens that all issues have been carefully and thoroughly con-

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[5] That definition reads as follows:

Secondary Materials listed below (being transported for purposes of recycling.)

Recycling for purposes of this tariff shall mean processing of waste, i.e., any product which has been or would ordinarily be discarded as worthless, defective or of no use, and the processing of such commodity transported in order to produce a commodity of the same kind as the commodity transported or to produce a previous state of the commodity transported.

A certification by the consignor must appear on the Bill of Lading as follows: "The increases published in Ex Parte 281 do not apply because the involved goods are being transported for purposes of recycling in a movement from —— to ——."

22 941	Textile Waste garneted or processed.	33 312	Copper matte, speiss or flue dust.
22 973 15	Noils, ramie.	33 322	Lead matte, speiss or flue dust.
22 973 25 thru 22 973 68	Noils (combings or comber waste), cotton. Rovings, jute and istle (ixtle).	33 332	Zinc dross, residues, ashes.
		33 342	Aluminum residues.
		33 398	Miscellaneous Nonferrous metal residues.
32 299 24	Cullet (broken glass).	40 1	Ashes.
33 119	Blast furnace or coke oven products, nec.	40 2	Waste or Scrap.

The STCC Numbers referred to shall also embrace all articles assigned additional digits listed thereunder.

This exception shall not apply to goods that are being processed solely by reason of contamination or defect in grade or quality, nor to by-products having a commercial market.

This exceptions is published solely in compliance with preliminary injunction issued on July 10, 1972, by the United States District Court for the District of Columbia in Civil Action No. 971-72, *S.C.R.A.P.* versus *United States.*

sidered. We again have studied the record in this proceeding, including the environmental representations, which are summarized in Appendix D to the prior report herein. The statement of facts in that report has not been challenged, and it is hereby incorporated by reference in this report. We shall repeat only such facts as are necessary for clarity of the discussion below. In addition, all available literature on this subject has been carefully studied. Attached as Appendix A hereto is a list of such material. To satisfy ourselves as to the thoroughness of this research, we submitted this bibliography to the railroads and to each of the petitioners named in footnote 4, *supra*, with the understanding that they would notify us as to any other relevant data of which they were aware.[6] We have also consulted with our staff, which had contacted knowledgeable individuals in this subject area in person, by mail, and by telephone in order to assure full compliance with NEPA.

We offer one further comment before discussing the involved issues. The criticism that has been leveled at us in this area we would describe as one-dimensional. Those critical of our actions in this proceeding see only environmental issues; to them, nothing more eixsts. However, we are not a one-dimensional agency, and the NEPA is not a one-dimensional statute. NEPA recognizes that existing agencies have other responsibilities and expects such agencies to add environmental considerations to their present decision-making formulae. In this report we have endeavored to consider environmental factors, long-range as well as short-term, but we have not lost sight of our other responsibilities. Our views are best summed up in the following statement issued by us in December 1970:

> We share the rising public concern with our environment and with the deterioration of our natural surroundings caused by pollution and by the misuse and depletion of our land and natural resources. We do so first as proud citizens of an involved community and

[6] Responses were received from the railroad respondents, the Institute of Scrap Iron and Steel, Inc., S.C.R.A.P., EPA, Copperweld, and EDF. Additional pertinent source materials were presented by each with the exceptions of S.C.R.A.P. and EDF. This additional material has been considered and identified in the "Supplementary Bibliography" in Appendix A.

> secondly, as Commissioners charged by the people of the United States, acting through their President and Congress, with the regulation of this Nation's surface transportation system in the public interest. *Transportation of "Waste" Products for Reuse*, 114 M.C.C. 92, 121.

Our determination to participate fully in the Nation's effort to stem the pollution of its environment and the depletion of its resources was further evidenced in Ex Parte No. 55 (Sub-No. 4), *Implementation of Public Law 91-190, National Environmental Policy Act of 1969 and Related Requirements.* In the order announcing the institution of that rulemaking proceeding, entered April 16, 1971 (339 I.C.C. at 511), we made clear that:

> The Commission must and will implement the directives of the NEPA and related pronouncements. We must and will investigate the methods of meeting these statutory directives to create a more meaningful relationship between this Commission's regulatory responsibilities and the Nation's battle to save the environment.

Our procedural rules, closely reflecting the guidelines enunciated by CEQ, as well as the ruling in *Calvert Cliffs' Coordinating Committee* v. *U.S. Atomic Energy Commission*, 449 F. 2d 1109 (D. C. Cir. 1971), decided in the interim, were promulgated by our order of January 14, 1972 (340 I.C.C. 431) and became effective shortly thereafter. With this background in mind, we shall turn now to the specific environmental questions here at issue.

Preliminary Discussion

Pollution threatens our existence. We believe that any plan to protect our surroundings must receive the cooperation of government, industry, and the public. The environment, however, does not exist in a vacuum. It affects and is in turn affected by many other facets of our lives. To examine and deal with the environment without considering these other factors would be like a doctor examining and treating a patient's heart without regard to the reaction of the remainder of his body. The doctor may cure the heart

ailment, but lose the patient. We fear that if we were to follow such a simplistic approach to this proceeding, we would not be evaluating the full scope of environmental effects as intended by NEPA.

Some of the parties to this proceeding, in our judgment, have failed to take a practical view of the total problems here involved. Instead, they plainly advance their individual interests. They do not seek to balance interests, but rather to exclude opposing interests. For example, the submitting railroads contend that they should not be required to finance industrial ecological programs through the maintenance of unduly low freight rates; the shipping interests request that their products not be subjected to the proposed rate increases or that those products should be subject to certain holddowns; the environmentalists maintain that rates on secondary materials (which assertedly should move in greater volumes for recycling purposes) ought to be preserved and protected (if not lowered) at all costs; and the governmental interests together with the private environmental sector seek to demonstrate that this Commission should investigate environmental matters and effects more extensively with our own resources. It is such one-dimensional approaches as these that we are knowingly seeking to avoid.

As Chief Justice Burger stated in *Aberdeen R. Co.* v. *SCRAP, supra:*

> Our society and its governmental instrumentalities having been less than alert to the needs of our environment for generations, have now taken protective steps. These developments, however praiseworthy, should not lead courts to exercise equitable powers loosely or casually whenever a claim of 'environmental damage' is asserted. The world must go on and new environmental legislation must be carefully meshed with more traditional patterns of federal regulation. The decisional process * * * is one of balancing and it is often a most difficult task.

It is our responsibility to balance fully, and without tipping the scales in favor of any single factor, the costs and benefits of our actions and any reasonable alternatives that may be presented. We trust that this impact statement accords

appropriate weight to economic and social considerations in addition to that which might be given environmental matters. No single element of human life should be permitted to operate to the detriment of all others.

It further should be noted that many persons participating in this proceeding seem to have adopted the position that, if a problem is incapable of a definite or mathematically precise solution, then it can best be solved by a large quantum of detailed evidence and statistics. This position, characterized by some as the "Dwarfing of Soft Variables Syndrome",[7] is a familiar one: If you can't count it, it doesn't exist. But no absolute or mathematically conclusive method of balancing the environmental, economic, and social values involved in a general rail freight increase proceeding currently exists. Instead, there are present a wide variety of unquantifiable factors which this Commission must bring to bear in such decision-making matters and which under the law, can only be brought to bear by this Commission, because of our expertise in surface transportation recognized by the Congress and the judiciary. We admit, of course, that readily quantifiable factors are easier to process—and hence more likely to be recognized and then reflected in the outcome—than are those that resist quantification. Nevertheless, the result, despite what turns out to be a spurious appearance of accuracy and completeness, is likely to be significantly warped and hence highly suspect. In our attempt, therefore, to analyze the probable results of any action we take in this proceeding upon the quality of our human environment, we have carefully examined the evidence of record, applied our expertise in surface transportation, and utilized to the fullest extent possible all available expertise in the ecological, economic, and social areas.

It is the purpose of the NEPA to have Federal agencies such as this Commission, in cooperation with State and local governments and other public and private organizations, use all practical means and measures to create and maintain conditions under which man and nature can exist in productive harmony. To this end, section 102 of the

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[7] Tribe, *Trial By Mathematics*, 84 Harv. L. Rev. 1329 (1972).

NEPA specifically requires that, to the fullest extent possible, we shall—

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality * * *, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes; * * *.

The NEPA section 102 impact statement is intended as a device to assure that Federal agencies investigate and give weight to any significant environmental effects caused by action which they take, to require the development of less damaging alternatives, and to assure that those effects are made known to the public before the action is undertaken. The guidelines of the Council on Environmental Quality,

reproduced in Appendix A to our report in *Implementation—Natl. Environmental Policy Act, 1969, supra*, seek to coordinate the efforts of government agencies and to allow Federal agencies to assess in detail the potential environmental impact of a considered course of action in order that adverse effects may be avoided, and environmental quality restored or enhanced, to the fullest extent practicable.

In this spirit, we shall proceed next to an analysis of the five separate criteria embodied in section 102(C) of the NEPA as quoted above. The Council on Environmental Quality in its guidelines and subsequent memoranda state that Federal agencies must consider the probable impact of the proposed action on the environment, including the impact on ecological systems such as wildlife, fish, and marine life. Both primary and secondary significant consequences for the environment should be included in the analysis. We are also directed to consider any probable adverse environmental effects which cannot be avoided, such as water or air pollution, undesirable land use patterns, damage to life systems, urban congestion, threats to health, or other consequences adverse to the environmental goals set forth in section 101(b) of the NEPA. In addition, all alternatives to major proposed actions must be evaluated even though this may lead to a consideration of effects and options outside this agency's actual control. Cf. *NRDC* v. *Morton*, 458 F2d 827 (C. A. D. C., 1972). That court concluded that a full discussion of such alternatives is required in order to reach the decision at hand as well as to inform the public of the issues and to guide the decisions of the President and the Congress, but that a detailed discussion is not required of alternatives that are deemed only remote and speculative possibilities and the agencies need not indulge in "crystal ball inquiry" in assessing the effects of alternatives. The agency, according to the *Morton* court, will have taken the "hard look" required by NEPA if it has discussed the reasonably foreseeable effects with a thoroughness commensurate with their severity and the significance of the action.

In accordance with the NEPA we must fully consider the relationship between local short-term uses of man's en-

vironment and the maintenance and enhancement of long-term productivity. This in essence requires this Commission to assess the proposed action for its cumulative and long-term effects from the perspective that each generation is trustee of the environment for succeeding generations. We are also directed by the NEPA to consider any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented. This requires us to identify the extent to which the considered action curtails the range of beneficial uses of the environment.

It probably would not be possible for us to issue separate environment impact statements for each specific commodity which has been classified as recyclable in this proceeding. Therefore, we have analyzed the overall environmental effects of the proposed rates increases on all recyclables as a class, separately on 8 commodity groups of recyclables, and on certain selected and representative commodities individually. We believe that this approach is administratively efficient and practical, and that this Commission has met its expansive obligations pursuant to NEPA.

Discrimination in the Rate Structure

It is contended that our approval of increased rail rates and charges on commodities moving for recycling purposes will serve to aggravate discrimination already allegedly in the railroad freight rate structure, to the detriment of recyclable commodities and the national recycling effort. Chairman Russell B. Train of CEQ, for example, has conveyed to us his belief that "several rail haul cost biases currently exist", and certain of the parties herein aver that discriminatory railroad rates and charges impede the movement of waste materials and favor the transportation of primary materials with "obvious" adverse consequences to the environment.

As recently as the last railroad general rate proceeding, we pointed out that such a case does not provide an appropriate vehicle for examining these issues. *Increased Freight Rates, 1970 and 1971*, 339 I.C.C. 125, 189 (1971). Thus, we do not attempt to determine whether the particular rates which result from the increases are maximum

reasonable rates, nor does the order constitute a prescription of rates within the meaning of the decision in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370. If individual rates or groups of rates are believed to be unjust and unreasonable, a shipper or other interested persons has an administrative remedy available in sections 13 and 15 of the Interstate Commerce Act, 49 U.S.C. §§ 13 and 15. General revenue proceedings are inappropriate forums for litigating such issues. *Electronic Industries Assn.* v. *United States*, 310 F. Supp. 1286, 1289 (D. D. C. 1970), aff'd mem., 401 U.S. 967 (1971); *Alabama Power Co.* v. *United States*, 316 F. Supp. 337, 338 (D. D. C. 1969), aff'd by a divided court, 400 U.S. 73 (1970); *Algoma Coke & Coal Co.* v. *United States*, 11 F. Supp. 487 (E.D. Va., 1935).

Moreover, we currently have under way a comprehensive investigation of the railroads' freight rate structure, Ex Parte No. 270, *Investigation of Railroad Freight Rate Structure*. That proceeding was instituted by us in recognition of the growing concern regarding the pricing of railroad services. More particularly, we felt the need for exploring whether, as has been contended, the application by the railroads of the increase in rates and charges as approved by us (especially when measured as percentages of existing rates) have over the years caused a misalignment of rate relationships and a distortion of proper rate levels. A specific area we have assigned for development in that case is the way in which our prior rate decisions may have an effect on the Government's program of protecting the environment. The Institute of Scrap Iron & Steel, Inc., the National Association of Secondary Material Industries, Inc., and other parties to this proceeding are parties as well to Ex Parte No. 270. This Commission has recently named a special counsel to further develop the record in Ex Parte No. 270. It seems clear that the broad inquiry into the rail freight rate structure that we have been asked to undertake in this proceeding would, in large measure, be duplicative of the matters under consideration in Ex Parte No. 270. Nevertheless, we think it appropriate to offer some observations in response to the allegations made.

The contention that the existing railroad rate structure contains a bias in favor of secondary materials to the prej-

udice of primary materials rests, exclusively, upon a surface comparison of their rates. Thus, for example, the Institute of Scrap Iron and Steel, Inc., notes that in 1966 the average rail revenue per 100 pounds was 20.6 cents for iron and steel scrap, whereas the comparable earnings on iron ore were but 8.2 cents. The charge that the rates on iron and steel scrap are more than twice those of iron ore has been repeated by others as well, and underlies the frequently repeated charge that the rail rate structure maintained by the railroads prefers primary materials to the undue prejudice of secondary materials.

The charge that the disparity in rates between iron and steel scrap and iron ore demonstrates an unwarranted bias, reflects an unfamiliarity with American transportation and a naivety as to rate making in domestic commerce that the Institute's long and sophisticated participation in our proceedings belies. If rates were established on nothing more than a consideration of the weight of the shipment, the Institute's charge would have

> * * * to bring a difference in rates within the prohibition of §3, it must be shown that the discrimination practiced is unjust when measured by the transportation standard. In other words, the difference in rates cannot be held illegal, unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions.

Accord: *Southern States Cooperative, Inc.*, v. *B. & O. R. Co.*, 323 I.C.C. 400, 408 (1964); *Southeastern Assn. of R. & Util. Comm.* v. *A., T. & S. F. Ry.*, 321 I.C.C. 519, 553 (1964); *United States* v. *Oklahoma City-ADA-Atoka Ry. Co.*, 319 I.C.C. 182, 186 (1963); and *Seattle Traffic Assn.* v. *CF, Inc.*, 306 I.C.C. 87, 92 (1959).

We begin by noting that there are literally hundreds of thousands of commodities that comprise the commerce of this Nation, and that the railroads through their network of connecting lines hold themselves out as common carriers of all of such commodities between each of the tens of thousands of points that they serve. To enable them to render their task of rate publication manageable, our Nation's railroads long have classified the freight that they transport.

Classification has a twofold meaning in transportation parlance.[8] In the one sense, the term identifies the process by which the myriad commodities tendered a carrier are grouped for the pricing of its services. As succinctly stated in Van Metre, *Industrial Traffic Management* 27 (1953):

> It must be immediately apparent that the publication of rates for a railroad system as large as that of the United States is a monumental task. Our railroads handle thousands of commodities each day, between thousands of stations. On each commodity handled there is a published freight rate applying to its transportation between each freight station and all other freight stations in the country. If all articles carried were charged an identical rate per hundred pounds, the tariff for a single station would have to be as large as a good-sized mail-order catalogue. But instead of one article, there are probably as many as 30,000 for which freight rates must be made.[9]

The process by which the publication of transportation charges of the thousands of articles in commerce is made manageable is classification. Classification as so used has been defined by the Supreme Court in *Director General* v. *Viscose Co.*, 254 U.S. 498, 503 (1921), as follows:

> Classification in carrier rate-making practice is grouping,—the association in a designated list, commodities, which, because of their inherent quality or value, or of the risks involved in shipment, or because of the manner or volume in which they are shipped or loaded,

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[8] For comprehensive discussion of this subject, see Colquitt, *The Art and Development of Freight Classification* (1956); and Way, *Elements of Freight Traffic* (1956).

[9] Drinker in Interstate Commerce Act 193 (1909) observed:

> "Classification," said the Commission in its first Annual Report, "is the foundation of all rate making."
>
> For the railroads to attempt to fix a separate rate for each commodity shipped, would not only be unduly burdensome to them and entirely impractical, but it would lead to an endless complication of tariffs, which would undoubtedly be more objectionable to shippers in general than a simpler system of rates adjusted with less theoretical nicety. On all sides it has been found advisable to sacrifice, to a certain extent, mathematical accuracy, for the sake of securing practical simplicity.

and the like, may justly and conveniently be given similar rates.* * *

The Commission has variously defined the classification of freight as "a rate-making scheme devised for the purpose of according the same rate to all commodities of a like character from a transportation standpoint", *McCrory Stores Corp.* v. *Director General*, 55 I.C.C. 423, 424 (1919); and *Hires Condensed Milk Co.* v. *P. R. R. Co.*, 38 I.C.C. 441, 447 (1916); "a matter of comparison of all the commodities that move as freight and the assignment of ratings such that each shall bear its fair share of the transportation burden", *Classification of Canned Goods*, 98 I.C.C. 166, 176 (1925); and "a determination of reasonable relations between commodities, with groupings of kindred articles." *National Electric Mfrs. Assn.* v. *Atchison, T. & S. F. Ry. Co.*, 289 I.C.C. 125, 132 (1953).

The factors that influence the freight's classification, the so-called transportation characteristics, are many and varied. In *Motor Carrier Rates in New England*, 47 M.C.C. 657, 660-61 (1948), these characteristics were listed in the following terms:

> The characteristics of the commodities which must be considered in fixing classification ratings are generally as follows:
>
> 1. Shipping weight per cubic foot.
> 2. Liability to damage.
> 3. Liability to damage other commodities with which it is transported.
> 4. Perishability.
> 5. Liability to spontaneous combustion or explosion.
> 6. Susceptibility to theft.
> 7. Value per pound in comparison with other articles.
> 8. Ease of difficulty in loading or unloading.
> 9. Stowability.
> 10. Excessive weight.
> 11. Excessive length.
> 12. Care or attention necessary in loading and transporting.
> 13. Trade conditions.

14. Value of service.
15. Competition with other commodities transported.

Accord: *All States Frgt.* v. *New York, N. H. & H. R. Co.*, 379 U.S. 343 (1964); *Class Rate Investigation, 1939*, 262 I.C.C. 447, 508 (1945); *Investigation and Suspension Docket No. 76*, 25 I.C.C. 442, 463, 472-73 (1912); and *Proctor & Gamble Co.* v. *C. H. & D. Ry. Co.*, 9 I.C.C. 440, 482 (1903).

The first of the listed transportation characteristics is the shipping weight per cubic foot, or density. As we have noted, domestic transportation charges in America generally are assessed on the basis of the weight of the shipment, that is, the rates are stated in terms of so many cents per 100 pounds. Obviously, under such a scheme of pricing, the shipper tendering a large shipment in terms of weight will pay more than the shipper tendering a light shipment. In other words, a shipper of a 1,000-pound box would be expected to pay more than the shipper of a 100-pound box. However, a carrier is limited in how much freight it can carry by the capacity of its equipment, and in any one piece of equipment it can carry a heavier load of freight having a low cubic displacement than it can shipments of high cubic displacement. Therefore, in determining the rate relationships of various commodities, that is, in grouping commodities for the assessment of transportation charges, it is natural that the carrier would rate freight of low density higher than freight of high density, all other things being equal. Feathers should be rated higher than lead, as indeed, they are. Van Metre in *Industrial Traffic Management* 51-52 (1953), says of this transportation characteristic:

> Since rates are almost all quoted in cents or dollars and cents per hundred pounds or per ton, it is plain that a car loaded to its capacity in pounds earns more than one which is loaded only to a fraction of that capacity. But there are many articles so light in proportion to their bulk that under no circumstances could enough of them be packed into a car to bring its load up to its weight capacity. Therefore it costs the railroad much more per hundred pounds to transport such articles than to transport articles so heavy in

proportion to the space they occupy that they can fill a car to the limit of its weight capacity. The light, bulky articles take up the earning space of the carrier's equipment, and the only way in which a carrier can secure revenue which adequately reflects the cost of transporting such articles is to make a high charge per hundred pounds for their transportation.

The significance of density as a transportation characteristic is illustrated by the shipments of bulk cottonseed from Blytheville, Arkansas, to Memphis, Tennessee, and of loose cotton in bags from Arbyrd, Missouri (Paragould, Ark.) to Memphis. Although these shipping points are approximately comparable, the cottonseed takes a rate of 17 cents per hundred pounds for a minimum shipment of 50,000 pounds (St. L. S. W. Ry. tariff 321-C, ICC No. 4853) while the loose cotton in bags takes a rate of $1.83 per hundred pounds (Tariff SWL 237-L, ICC No. 4907). This elevenfold difference in rates is explained upon an examination of sample waybills. The cottonseed loads heavily at over 70,000 pounds per car, resulting in freight revenue of over $120 per car to the carrier. The loose cotton in bags of course loads lightly and, at about 6,000 pounds per car, earned less than $120 per car for the carrier. Since the carrier's costs for moving the two cars are similar, except for such items as added fuel costs for pulling a heavier car, the large difference in rates only enabled the carrier to realize comparable revenues on the movements.

Another roughly comparable movement of primary and refuse materials is the transportation of cotton linters from Greenville, Miss., to Memphis, Tenn., and the movement of cotton motes from Greenwood, Miss., to Memphis. The linters move at a rate of 32 cents per hundred pounds with a minimum shipment of 60,000 pounds (SFTB 2011-M) while the motes bear a scale of rates:

Minimum Weight-pounds	Rate-cents per hundred pounds
20,000	60
30,000	42
40,000	39
excess over 40,000 in same car	32

An examination of sample waybills again revealed that while the motes load at just over 40,000 pounds per car, thus bearing the 39 cent rate, the linters load at over 60,000 pounds per car. The revenue realized by the carrier is higher for the lower rated commodity: the 20 percent difference in rates is more than offset by the 50 percent difference in loading characteristics, as far as the carrier is concerned.

The next group of transportation characteristics—liability to damage, liability to damage to the commodities with which it is transported, perishability, liabilty to spontaneous combuston and explosion, and susceptibility to theft—relate to the obligation of the railroads as bailees of the goods that they transport.

Whatever may have been the obligation of the railroads under the common law, under the provisions of the Interstate Commerce Act, rail carriers are tantamount to insurers of the safe delivery of cargoes entrusted to their care for transportation. *Loss and Damage Claims*, 340 I.C.C. 515 (1972). Section 20(11) of the Interstate Commerce Act, 49 U.S.C. §20(11), states "That any common carrier, railroad, or transportation company * * * shall be liable * * * for any loss, damage, or injury * * * caused by it [or by its connecting carriers]" to the property transported by it. That being the case, it stands to reason that in establishing the rate relationship between the many commodities they transport, the railroads should assess a higher charge on freight more likely to be lost or damaged in transit than on freight not having such a tendency. Thus, electric light bulbs should be rated higher than electric switches, as, of course, they are.

The next transportation characteristic—value—is related. If two packages of equal weight are lost in transit, the carrier incurs a greater monetary loss in paying the claim of the shipper of the more valuable freight than it does in paying any that may be submitted on the less valuable freight. Accordingly, in establishing the relationship of rates it would be appropriate for the carriers to assess the former a higher rate than the latter. In other words, as a measure of the risks assumed, value clearly is a transportation characteristic to be taken into account. More-

over, value is a factor in classification for the further reason that it generally is indicative of the ability of a commodity to pay the transportation charges. *Rates on Lumber and Lumber Products*, 52 I.C.C. 598, 615 (1919).

In the latter respect, according the value of the commodity consideration in establishing the relationship of transportation charges is not dissimilar from ordinary commercial practices. It is almost universally true that merchants and manufacturers have a greater markup or assign a greater portion of their overhead and anticipated profit to their expensive items than to those bearing a smaller price. The railroads and other domestic transportation companies long have done no less. As Professor Locklin has noted in his *Economics in Transportation* (6th Edition 1966) p. 418:

> It has been customary from the earliest days of railway development to charge comparative high rates on valuable articles and lower rates on cheaper articles * * * sometimes the value commodities will not stand high rates, but the usual relationship clearly warrants the prominence generally given to value comparisons in rate cases. There is no need of giving citations to cases in which the Commission has acknowledged value of the article as a factor to be considered in determining the reasonableness of rates. Their number is legion. In fact, there is scarcely a case involving rates on particular articles which does not make use of value comparisons. In many cases value becomes the controlling consideration.

The next characteristic—ease or difficulty in loading or unloading, stowability, excessive weight, excessive length, and care or attention necessary in loading and transporting—can be treated as a group. That they affect the costs incurred in performing the transportation and, accordingly, warrant consideration by the carrier in establishing the relationship of its transportation charges is so obvious as to require little or no amplification.

As we previously have noted, domestic transportation charges in America are generally stated in terms of so many cents a hundredweight. That being the case, the carrier needs to receive greater compensation for a ship-

ment of freight requiring extraordinary handling than one of equal weight that can be moved in the usual fashion. Thus, for example, a 10,000-pound transformer of a type used at a power company substation, requiring skids, winches, or similar device for loading or unloading, should take a higher charge per 100 pounds than a shipment of equal total weight of boxed transformers of the type used in installing door chimes in private dwellings. Similarly, it stands to reason that, all things being equal, the carrier should receive more money for handling a 100-pound bar of steel stretched to a 50-foot length than it can collect for a barrel of nails of equal weight. In fact the railroads and other domestic carriers assess their rates just that way. Referring to these factors, among others, Flood in *Traffic Management* (2d Edition 1963) p. 97, concluded, "Additional services required to transport a specific commodity add to the transportation costs and therefore become important elements in classifying the commodity."

As for the next transportation characteristic—trade conditions—we heretofore have noted that a depressed condition existing in an industry may be a proper factor to be considered in determining the reasonableness of the rates that apply on its products. Thus, in a case involving rates on wool, *In re Transportation of Wool, Hides and Pelts*, 23 I.C.C. 151, 156 (1912), it was said, "If the condition of this industry is such that it cannot flourish, that the traffic will not move for the reason that the wool iself will not be produced, that, certainly, is a circumstances which may be considered in comparing this rate with those upon other commodities." Again, in *Utah-Idaho Millers & Grain Dealers Assoc.* v. *Denver & Rio Grande R.R. Co.*, 44 I.C.C. 714, 726 (1917), it was concluded, " * * * the condition of an industry has an influence upon the ability of a commodity produced by that industry to bear a rate, which in turn may have a bearing upon the reasonableness of the rate charged." Accord: *Wool & Mohair Rates*, 276 I.C.C. 259, 269 (1949); *Livestock—Western District Rates*, 190 I.C.C. 611, 633 (1933); and *Rates and Charges on Grain & Grain Products*, 94 I.C.C. 105, 143 (1924).

Professor Locklin in *Economics of Transportation* (6th Edition 1966) p. 427 said:

The ability of a particular commodity to stand a rate is sometimes affected by the conditions of prosperity or depression within the industry which produces the commodity. If an industry is in a depressed condition, high rates may result in curtailed production. Conversely, if the industry is prosperous, rates may be increased without affecting production. For this reason the Commission has long recognized that the conditions existing in an industry may be taken into consideration in determining the reasonableness of rates. This position has the approval of the United States Supreme Court, for in *Ann Arbor Railroad Co.* v. *United States* the Court said: "In rate making under existing laws it has been recognized that conditions in a particular industry may and should be considered along with other factors in fixing rates for that industry and in determining their reasonableness." The principle received special emphasis in the Hoch-Smith Resolution, passed by Congress in 1925, which declared that the "true policy" to be observed by the Interstate Commerce Commission in adjusting rates was "that the conditions which at any given time prevail in our several industries should be considered in so far as it is legally possible to do so, to the end that commodities may freely move."

The principle that rates should be adjusted in accordance with the economic conditions existing in an industry may easily be abused. It is valid only in so far as it throws light on ability to pay transportation charges. It is not valid when used to help one class of individuals at the expense of another. The Interstate Commerce Commission has emphatically declared that it is not justified in reducing rates on a commodity merely to relieve a distressed industry. This position was taken in a number of cases which came up after World War I, when the agricultural interests argued for lower rates on the products of agriculture on the ground that the industry was in a depressed condition. These pleas were, as a rule, unsuccessful. The soundness of the Commission's reasoning on the question of reducing rates to help a distressed industry cannot be

> questioned. If the rates are reduced to help out one industry, the burden of the reduction must be borne by the railroads or shifted to other shippers and consumers by increasing the rates on other products. The railroad is not an eleemosynary institution and ought not to be required to forego reasonable compensation for the services it renders.* * * [Footnotes omitted.]

The next transportation characteristic—value of service—is perhaps the least understood and most frequently maligned of the factors influencing the establishment of the relationship of transportation charges. Here again, however, what the railroads and other domestic transportation companies long have done is wholly analogous to the practice that universally obtains in commerce and industry. Manufacturers and merchants routinely assess the market demand for their products and price them accordingly. An item that may be very much in demand one day, commanding a correspondingly high price, the next day will become a glut on the market, not to be sold at any price as the fashion may have changed. Thus, for example, today there might be few takers for Daniel Boone coonskin caps even if they were virtually given away. On the other hand, as the demand for a product surges, so does its price, as anyone who was lucky enough not to have thrown out his grandmother's coffee mill, mason jars, or other items now prized as antiques will testify. If such pricing in accordance with the elasticity of demand constitutes charging what the traffic will bear, then that is nothing more than an economic fact of life.

The traditional railroad rate structure of this country was characterized by value of service pricing. The railroads were known freely to charge their shippers what the traffic would bear. With the advent of the motor carriers, pipelines, and other competitors for freight and with the competition for traffic having become intensive and pervasive, as we find it to be today, it has been urged that value of service no longer is an appropriate factor to be considered in the setting of transportation rates and charges. This misapprehends completely the role of value of service, for the intensity and pervasiveness of today's competition have not diminished in any way the relevance

of elasticity of demand as a matter to be taken into account in setting railroad rates and charges; it simply means that the elasticity of demand for railroad service has increased greatly and that shippers of freight will divert their traffic to alternative modes when confronted by increased railroad charges more so than they ever have been able to do before.

Professor Way in *Elements of Freight Traffic* (1956) pp. 124-25, explained the role of value of service under contemporary conditions as follows:

> Value of service should not be confused with value of the shipment. Although in traffic matters there is a definite relationship between the two, each is different. The former refers to the transportation service performed by carriers; the latter, to some particular commodity itself. A relatively high rating of a high-valued article results in a freight rate which is higher than one obtained from a low rating; but the resultant high rate is a small proportion of the selling price of the high-valued article, in contrast to a low rating of a cheap commodity resulting in a rate which is a substantial part of its price. Therefore, even the resulting low rate on a low-valued commodity has much greater influence both upon its selling price and the consequent demand of the public for it, than a high rate on high-valued articles. Consequently, relatively high ratings do not restrict shipments of high-valued goods nearly as much as they influence the geographical extent of markets for low-valued goods, which means value of service is much greater and more sensitive for shippers of low-valued commodities than for shippers of high-valued commodities. The former are able and willing to pay less than the latter for transportation service, because the freight rate is a greater direct part of the former's cost of production and distribution than to latter's.
>
> This situation is recognized by the carriers in rating determination, for they realize any action on their part which restricts the demand for an article itself, by an appreciable proportionate increase in its price, will reduce the demand of shippers of that article for

transportation service. It is for this reason that there is such wide divergence among ratings and that "Exceptions," which will be explained later, have been adopted. Of course, no rating can be so low, regardless of the value of service and ultimate loss of traffic, that the applicable rate will produce revenue at least no less than the carrier's out-of-pocket costs of providing the service. While value of service to the shipper constitutes the highest level of rates, costs to the carrier of furnishing the service represent the lowest level. In practically all instances, the rating of a particular article falls somewhere between the two extremes, depending entirely upon the influence of the other classification factors as they are applied to individual situations. [Footnote omitted.]

Finally, the last of the transportation characteristics which have been listed as influencing the classification of freight—competition with other commodities transported—is perhaps the most important one in evaluating properly the contention advanced herein that the railroad rate structure discriminates against secondary materials. Only recently, we received the decision of the United States District Court for the Western District of New York in Civil Action No. 1971-542, *National Gypsum Company, et al.* v. *United States, et al.*, F. Supp , which clearly and concisely reiterates the principles which obtain in assessing the importance of competition as a factor in explaining disparate rates.

Involved in that case were disparate railroad rates from nine origins in West Virginia, Ohio, Pennsylvania, and Kentucky to the port of Toledo, Ohio. The plaintiffs were receivers of metallurgical coal, which alleged that the lower rates that the railroads assessed on steam coal were discriminatory, in violation of section 2 of the Interstate Commerce Act. The Court said:

For many years the Supreme Court has recognized that the carrier's necessity of meeting competitive conditions in order to retain business is an important consideration, which may provide a sufficient dissimilarity of conditions to warrant a reasonable difference in rates that will not be classified as unjustly discrimina-

tory. In *Texas & Pac. Railway* v. *Interstate Commerce Commission*, 162 U.S. 197 (1896), the Texas & Pacific published a lower rate for transportation from New Orleans to California of traffic imported from Europe than for carriage of identical domestic traffic between the same points. The lower rate was justified as necessary to avoid the loss of the European traffic altogether to competition which would transport it to the California coast by water. Upholding the discrimination as justified, the Court stated:

> We think that Congress has here pointed out that, in considering questions of this sort, the Commission is not only to consider the wishes and interests of the shippers and merchants of large cities, but to consider also the desire and advantage of the carriers in securing special forms of traffic, and the interest of the public that the carriers should secure that traffic, rather than abandon it, or not attempt to secure it. It is self-evident that many cases may and do arise where, although the object of the carriers is to secure the traffic for their own purposes and upon their own lines, yet, nevertheless, the very fact that they seek, by the charges they make, to secure it, operates in the interests of the public.
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> * * * *
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> The principal purpose of the second section is to prevent unjust discrimination between shippers. It implies that, in deciding whether differences in charges, in given cases, were or were not unjust, there must be a consideration of the several questions whether the services rendered were "like and contemporaneous," whether the kinds of traffic were "like," whether the transportation was effected under "substantially similar circumstances and conditions." To answer such questions, in any case coming before the Commission, requires an investigation into the facts; and we think that Congress must have intended that whatever would be regarded by common carriers, apart from the operation of the statute, as matters which warranted differences in charges, ought to be considered in forming a judg-

ment whether such differences were or were not "unjust." Some charges might be unjust to shippers—others might be unjust to the carriers. The rights and interests of both must under the terms of the act, be regarded by the Commission. 162 U.S. 197, 218-19.

We are not persuaded by plaintiffs' contention that the teaching of *Texas & Pac. Railway* is limited to a difference between import and domestic traffic. The basis of the decision is much broader than that. It is grounded upon the principle that the necessity of meeting competition in order to retain traffic is a circumstance that will be given heavy weight in deciding whether a difference in rates is unjust or unreasonable. Just as the railroads were entitled in *Texas & Pac. Railway* to publish lower rates on import traffic in order to induce it to move through the affected ports rather than use cheaper water transportation, the railroads were here entitled to do likewise in order to avoid a very substantial loss of business and resulting revenue that might well have required them to charge even higher rates to plaintiffs than at present in order to meet the higher operating costs per ton that would result from the decline in volume of traffic.

The viability of the principle established by *Texas & Pac. Railway* has repeatedly been confirmed. *Barringer & Co.* v. *United States*, 319 U.S. 1 (1943) (railroad permitted to eliminate a loading charge for cotton destined for Gulf ports in order to meet truck competition but to retain charge on cotton destined for other southeastern ports); *Koppers Company* v. *United States*, 166 F. Supp. 96, 101 (W. D. Pa. 1958); *Coal to New York Harbor*, 311 I.C.C. 355 (1960); *Consolidated Edison Co. of New York, Inc.* v. *Virginia Ry. Co.*, 292 I.C.C. 23, 35-38 (1954); *Reduced Rates on Coal from the East to the Northwest*, 292 I.C.C. 119, 137-38 (1954); *Coal from Ky., Va., and West Va., to Virginia*, 308 I.C.C. 99 (1959); *Wyandotte Chemicals Corporation* v. *The Baltimore and Ohio Railroad Company, et al.* (not published) I.C.C. Dkt. No. 34460 (Sub-No. 1), decided June, 1965. The Commission's settled

construction of §2 is entitled to the "highest respect." *United States* v. *Missouri Pacific R. Co.*, 278 U.S. 269, 280 (1929).

The foregoing presents a summary of the foremost transportation characteristics which, as we noted at the outset, are considered in the classification of freight. While any one of the transportation characteristics, considered alone, might appear to warrant a higher or lower classification rating of particular freight, all of them are taken into consideration, and no one of them is controlling. *Vacuum Cleaner Manufacturers Assn.* v. *Atchison, T. & S. F. Ry. Co.*, 276 I.C.C. 783, 792 (1950); *Class Rate Investigation 1939*, 262 I.C.C. 447, 508 (1945); *Nashville Traffic Bureau* v. *L. & N. R.R. Co.*, 68 I.C.C. 623, 626 (1922); and *McCrory Stores Corp.* v. *Director General*, 55 I.C.C. 423, 424 (1919).

It is well known, however, that relatively little freight transported by the Nation's railroads moves solely in accordance with these principles, or upon class rates. Rather, approximately 90 percent of the railroads' traffic moves on so-called commodity rates. Commodity rates long have been recognized as a concession to a particular situation that requires departure from the basic rate structure embodied in the schedules of class rates. "[C]ommodity rates are special rates which ought to be made with reference to all the conditions surrounding the transportation of the particular articles between the particular points." *The Mississippi River Case*, 28 I.C.C. 47, 63 (1913); and *Railroad Commission of Louisiana* v. *A. H. T. Ry. Co.*, 48 I.C.C. 312, 269 (1918).[10]

An observer, Landon, in *Transportation* 315 (1951) noted:

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[10] Wyman in *Railroad Rate Regulation* 423 (2d Ed. 1915) stated:

"The principle on which such [commodity] rates are established is doubtless a sound one. The articles which are granted commodity rates are staples of comparatively low value, like grain, lumber, and salt, moving in great quantities over roads of which they form a large part of their traffic. A granger road, carrying great quantities of grain in bulk, is in an entirely different position as to traffic in grain from a road in another part of the country carrying small quantities from time to time to the small consumer; and while the traffic of the latter road can be classified, that of the former requires special treatment.

Commodity rates are special rates for products that move in large volume, such as lumber, wheat, coal, iron ore, cotton, and many others. They are lower than the applicable class rates and are usually carload rates. Commodity rates as low as 8 percent of the first-class rates applying in particular areas are numerous for articles unable to bear higher charges.

The nature of the commodities that are apt to be accorded commodity rates permits the generalization, as made by Van Metre in *Industrial Traffic Management* 28 (1953), that "While the number of shipments charged class rates is much greater than the number of shipments that are charged commodity rates for their transportation, the volume of traffic moving under commodity rates is far greater than the volume of traffic moving under class rates."

In establishing commodity rates railroads take into account additional factors, among which the most prominent are the volume of the movement in question, its regularity, duration, direction, and length. We next shall consider these.

An obvious determinent of the level of rates to be assessed in the size of the shipment. Certain costs are incurred by a railroad regardless of how large or how small a shipment may be, and these include the costs attending the preparation of the bill of lading, the rendition of a statement of charges owing, the tracing of the shipment if astray, or the processing of a claim if damaged or lost in transit. Such costs are substantially the same whether the carrier handles a 40-pound shipment or a 40,000-pound shipment; and, therefore, all things being equal, the rate per 100 pounds for handling the former should be substantially higher than that which applies on the latter. In transportation parlance, it is axiomatic that LTL rates should be higher than truckload; LCL rates, higher than carload.

This relationship is no less valid when only volume shipments are considered, particularly in the case of the railroads. In other words, certain costs are incurred by a railroad regardless of how many carloads of freight comprise

a shipment. Apart from the housekeeping or overhead costs previously enumerated, there are those related to picking up and spotting the cars that are the same or substantially so regardless of the number of cars involved. Dispatching the locomotive, switching it to the siding, pulling the cars to the assembly or classification yards at origin, and the reverse procedure at destination are similar whether the shipments consists of one car or ten. Therefore, once again, all things being equal, the rate per 100 pounds for handling the former should be substantially higher than that which applies on the latter. In transportation parlance, it has become commonplace that carload rates should be higher than multiple carload or trainload rates. This, then, is a function of the volumes of the movement in question.

In considering the rate relationships between iron ore and scrap iron and steel, we have examined the movement of scrap from Curtis Bay, Md. (Baltimore) to Steelton, Pa. (Harrisburg). The scrap rates for this movement are (B&O Tariff 488-A, suppl. 123, ICC No. 24822):

Weight of Shipment	Rate
44,800 lbs.	$8.17 per gross ton
80,000 lbs.	7.19 per gross ton
600 gross tons in not more than 12 cars	5.02 per gross ton
900 gross tons in not more than 18 cars	4.45 per gross ton
1200 gross tons in not more than 24 cars	3.87 per gross ton

This table of rates shows that volume shipments are in fact accorded lower rates. As can be seen, a 1200 gross ton shipment, which is substantially below a unit-train lot, bears a rate roughly one-half that of the single car rates. We have examined several random waybills covering actual movements under this tariff and found three single car shipments of about 115,000 pounds each at a rate of $7.19 per gross ton, and an 18 car shipment of 68 gross tons (76.2 net tons) per car at a rate of $3.87 per gross ton.

Another example of the relationship between rates and weight of a shipment is shown by the following rates on cotton refuse (Tariff SFA S-2011-M, ICC No. S-1019):

From East Point, Ga. (Atlanta) to Memphis, Tenn.		From Stonewall, Miss. to Memphis, Tenn.	
Min. Wt-pounds	Rate-cents per 100 lbs.	Min. Wt.	Rate
20,000	105	20,000	83
30,000	71	30,000	57
40,000	63	40,000	52
excess over 40,000	52	excess over 40,000	41

Thus by heavy loading, shippers can take advantage of rates which are almost one-half of the maximum rates.

As for its regularity, it requires little elaboration that a railroad which can anticipate pulling three cars of freight daily from a particular industry can plan more efficiently and, hence, can operate more economically than it can to an industry that has no requirements one week and then tenders a shipment of 18 cars the first day of the following week. Although the two shippers may be the source of an equal amount of traffic for the railroad, it would not be unreasonable for the former to be accorded a more favorable rate than the latter. Similarly, it requires little or no elaboration to justify lower rates when the movements reasonably can be expected to continue for several years than when their duration is anticipated to be short-lived.

Direction is a factor whenever a railroad experiences an imbalance in the flow of freight. One of the most interesting examples of the influence of this factor which we encountered in recent years involved a railroad engaged in the transportation of phosphate in hopper cars from Florida. In order to avoid the empty return of its equipment, the railroad published drastically reduced barge-competitive rates on coal, thereby achieving a balanced movement.

Finally, the length of the movement is a factor to be considered in establishing the relationship of rates for many of the same reasons that volume is. Essentially, terminal costs, the costs incurred in originating and terminating the movements, remain identical whether the intervening line-haul transportation is 50 miles or 500 miles. Therefore, all things being equal, the rate per 100

pounds for handling the former should be substantially higher than that which applies on the latter.

It is against a background of these many, varied, and yet significant factors that enter into the establishment of the relationships that obtain in the railroad rate structure that the axiom that a mere disparity in rates does not establish discrimination or undue preference, assumes real meaning. It is against the background of these that we conclude that no case for discrimination or undue preference has been made by arguing that the railroads as a group in 1965 may have received an average of 2.5 times as much per hundredweight for transporting iron and steel scrap than they did for handling iron ore.

The comparison between the average revenue per 100 pounds on iron and steel scrap and iron ore reveals very little; it certainly does not establish that the former was disadvantaged in relation to the latter. It tells us nothing about the transportation characteristics we just have discussed. It provides no information as to the lengths of the movements making up the average, and whether the hauls of iron and steel scrap may not have been considerably shorter than those of the iron ore. It tells us nothing of the duration of the movements and their regularity, and whether the movements of iron and steel scrap may not have been far more sporadic and cyclical than those of the iron ore. It fails to inform us as to the volume of the movements going into the average, and whether the tonnages tendered of iron and steel scrap may have been far less than those of iron ore. Our experience, our prior cases, and, indeed, the record herein suggest that each one of these transportation characteristics, relevant to a comparison of the rates, may not be nearly as favorable for iron and steel scrap as for iron ore. The Institute's simplistic argument tells us nothing of the density of the commodities, and whether iron and steel scrap, particularly before shredding or compacting, may not be lighter than iron ore. It provides no data as to the ease of loading and unloading of the commodities and of their tendency to damage the carriers' equipment, and whether iron and steel scrap may not be dumped into gondolas from magnetic or clamshell cranes whereas iron ore flows into

hoppers from overhead bins or conveyors. It tells us nothing of the intensity of competition in the trade, and whether iron and steel scrap is the subject of the kind of competition that is characteristic of the iron ore area. Again, our experience, our prior cases, and, indeed, the record herein suggest that each of these factors may not be nearly as favorable for iron and steel scrap in comparison to iron ore.

As we have indicated, the cost of transporting a commodity by rail is affected by the volume in which it moves. All things being equal, if the volume of movement is large, a carrier is in a position to organize better its operations and methods of handling the commodity and so reduce the cost of carrying the freight (i.e., the costs directly assignable to the commodity). However, in order for a large volume of movement to justify a lower rate on one article than on another, the larger volume should actually lower direct costs. The most striking example of this principle occurs where the volume of traffic in a single commodity permits its movement in continuous, solid trainloads. Iron ore with a number of economical attributes is an excellent illustration of such a distinctive transport pattern. Iron ore is a dense, homogenous material, which moves in huge volumes from the mines or transshipping ports (i.e., iron ore frequently moves in trainload quantities of 100 or more cars), and requires little or no special, individual handling. Moreover, high density permits heavy loading per car, and homogeneity eliminates the need for detailed identification and the concomitant costs thereof. Additionally the absence of special handling requirements also lowers the cost per movement. Thus, over time, specific types of vessels and rolling stock adapted to the iron ore movement have been developed; docks equipped with special bulk mechanical handling devices for loading and unloading the freight at both ends of the haul have been brought into use; and railroad yards have been designed with particular reference to the traffic. The actual effect of such volume movements can readily be observed in the operations of the Duluth, Missabe and Iron Range Ry. Company and the Bessemer and Lake Erie Railroad Company. For instance, the D.M.&I.R., which originates roughly 35 percent of the total iron ore tonnage and derives approximately 88 per-

cent of its total freight revenue from these movements has specialized its handling to a point where its entire system-wide operating ratio has been lowered to 65.1 percent. The B&LE, although not handling as much iron ore traffic as the D.M.&I.R., nevertheless has a comparable system-wide operating ratio of some 62.5 percent. Iron ore movements account for almost 54 percent of Bessemer's total freight revenue. In those instances where iron ore traffic is not as significant to, or the movements are not as continuous for, an originating railroad, the operating ratios are higher.

In direct contrast to concentration of iron ore movements the iron and steel scrap flow pattern is diffused and, except for Penn Central, the tonnage is rather thinly spread out among almost all of the Nation's 68 Class I railroads.

In essence, iron ore moves largely over a few single-line direct routes, whereas scrap moves via many railroads mainly in single carloads over a multiplicity of routes, some of whch are extremely circuitous. Furthermore, the tendency of scrap to originate over broad areas for concentration, and to some extent fabrication, and then to disberse over other destination areas necessitates a transport system replete with feeder and secondary routes supporting the main intercity arteries. Such a scattered type of flow pattern can be expected to cause a few cost and service deficiency problems as noted by the shippers of scrap iron and steel in Ex Parte 265 and 267 (i.e., excessive transit time, terminal and interchange delays, car shortages, bunching of cars, etc.).[11]

Regularity of movement is also a most important factor entering into the measurement of relative cost of railroad service. If traffic moves regularly, it can be transported with greater economy (i.e., more economical train schedules can be worked out, and empty cars can be supplied with a minimum of expense, etc.). On the other hand, irregularity of movements has the opposite effect. This is particularly true when there is a distinctly seasonal movement, such as certain types of scrap, which taxes the carrier's facilities at certain times and results in idle equipment and facilities at others.

[11] Ex Parte 265 and 267, *Increased Freight Rates—1970 and 1971*, 339 I.C.C. 125.

The advantages in line-haul cost reflecting the economic efficiency in iron ore movement between the highly specialized open top hopper car, with its drop frame that allows for an unloading in one swift motion, and the gondola car is significant irrespective of the territory in which they operate.

With respect to the terminal investment required by the various carriers, that also differs materially depending upon the predominant type of traffic in which the carrier is engaged. Thus, railroads which specialize in iron ore traffic moving directly from the mines require facilities entirely different from those carriers serving a highly industrialized territory. In contrast to the simplicity of the iron ore operation the latter situation requires an intensive system of switching lines and siding connection to accommodate a great number of industries. In a large industrial area, such as that of the Official Territory, this results in great dispersion in the origination and termination of freight, commonly requiring a number of switching yards serving each section in the industrial district. The operation is often conducted under extremely congested conditions. High land values and the built-up nature of adjacent lands makes expansion or improvements possible only at prohibitive costs. In consequence, expanded freight business must be handled by existing facilities under a system of most intensive operation, and unit costs accordingly are obviously high.

Data drawn from the railroad's experience in Official Territory, the industrial heartland of America, will permit a meaningful comparison to be made between the two categories of commodities. Within Official Territory are the Great Lakes ports of Cleveland and Toledo, important in the movement of domestic iron ore, and the Atlantic Ocean ports of Philadelphia and Baltimore, gateways in the movement of import iron ore. Here are the iron and steel centers of Gary, Youngstown, Pittsburgh, Fairless and Sparrows Point, and finally, within the territory the greatest amounts of iron and steel scrap, both home and waste, are generated. Indeed Penn Central Transportation Company, which blankets the area like no other railroad, alone

originates about one-third of all of the iron and steel scrap transported within the United States.

We find that within Official Territory, carloads of iron ore load far more heavily than carloads of iron and steel scrap; as a matter of fact, carloads of iron ore consistently average nearly half again the weight of carloads of iron and steel scrap. Similarly, we find that iron ore travels further than iron and steel scrap; the average haul per car of iron ore has been nearly twice that of iron and steel scrap.[12]

	Iron Ore		Iron and Steel Scrap	
	Average Ton Per Car	Average Haul Per Car	Average Ton Per Car	Average Haul Per Car
1964	76.0	184	53.4	96
1965	77.7	186	53.4	95
1966	78.7	178	54.1	107
1969	77.6	194	55.5	103

Source: Carload Waybill Statistics

At the same time the rate disparity between iron ore and iron and steel scrap moving in Official Territory is not as great as it is generally represented to be. In 1966 the average revenue per hundredweight earned by the railroads in handling iron ore was 60 percent of that of the average revenue earned on iron and steel scrap. In 1969 it was 55 percent. However, the more significant earnings figure, average revenue per car, was not nearly as disparate. In 1966 the average revenue per car of iron ore was 85 percent that of iron and steel scrap, and in 1969, 80 percent.

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[12] In *Price-Watson* v. *Elgin, J. & E. Ry. Co.*, 329 I.C.C. 736, 740 (1967), sustained, *Price-Watson Co.* v. *United States*, 287 F. Supp. 872 (N.D. Ill. 1968) we noted that the average haul of scrap iron in Official Territory was only 84 miles. This compares with our findings in *Increased Rates on Iron Ore*, 313 I.C.C. 549, 566 (1961), that about the same time the average haul of iron ore was 142 miles on ex-lake traffic and 357 miles on import traffic. The railroads serving the eastern district transported a total of 55.5 million net tons of iron ore, that traffic comprising 5.18 percent of their tonnage and 2.8 percent of their revenue. *Id.*, 313 I.C.C. at 551.

	Iron Ore		Iron and Steel Scrap	
	Average Revenue		Average Revenue	
	Per Cwt.	Per Car	Per Cwt.	Per Car
1966	11.1	174	18.9	205
1969	11.5	179	20.8	231

Source: Carload Waybill Statistics

Indeed, we find that some of the rates maintained by the railroads on comparable movements of iron ore and iron and steel scrap are not dissimilar. For example, the multiple car rate on iron and steel scrap from Curtis Bay (Baltimore), Md., to Steelton (Harrisburg), Pa., is $3.87 per gross ton, whereas the rate on iron ore is $3.57. Baltimore & Ohio Railroad, Tariff No. 4988, ICC No. 24822, Supplement 123, item 630B, and Tariff No. 1014, ICC No. 24789, Supplement 141, item 3115E.

Even at the slightly lower rates at which the Official Territory railroads handle iron ore than they transport iron and steel scrap, they find they are making more money on the former than they are on the latter. Using an average shipment of about 72 carloads of over 76 tons each as an example, we have calculated that railroads' variable cost per ton for the above movement of iron ore and iron and steel scrap. The results were developed through procedures from Statement No. ICI-69, *Rail Carload Cost Scales by Territories for the Year 1969,* issued as information by our Bureau of Accounts but not adopted by us. The calculation establishes that the carriers' variable cost per gross ton of iron ore is about $1.70 while that for scrap is about $2.28. This difference in costs ($0.58) it wil be noted is larger than the difference in rates ($0.30).

Within Official Territory both the terminal and the through-train line-haul costs in handling iron ore in hopper cars are lower than they are for handling iron and steel scrap in gondola cars.

	1969 Terminal Costs Per Carload	1969 Line-Haul Costs Per car-mile
Iron ore	4506.670	25.21934
Iron and steel scrap	9134.915	28.37805

Source: Section of Cost Finding

Stated differently, the revenue contribution that iron ore makes to burden is greater on a variable cost basis and only slightly less on a fully allocated cost basis than the revenue contribution of the iron and steel scrap movements in Official Territory.

	1969 Contribution to variable costs	1969 Contribution to fully allocated costs
Iron ore	143.1	103.8
Iron and steel scrap	137.88	120.1

Source: Department of Transportation

We do not believe the foregoing comparisons of the movements of iron ore and iron and steel scrap fairly permit the conclusion that the rate disparity between these groups of commodities has unduly preferred the former and discriminated against the latter. Our prior decisions generally have been to the same effect.

Only a few years ago we were called upon expressly to respond to the contention that the rail rates on scrap iron and steel were unduly prejudicial in relation to those on iron ore. *Institute of Scrap Iron and Steel, Inc.* v. *Akron, C. & Y. R.*, 316 I.C.C. 55 (1962), sustained sub nom. *Frank Adams & Co.* v. *United States* (unreported, C.A. No. 5093, S.D. Ohio, May 8, 1963), aff'd mem., 375 U.S. 215 (1963), rehearing denied, 276 U.S. 929 (1964). In dismissing the complaint of the Institute of Scrap Iron and Steel, Inc., 316 I.C.C. at 67, we specially noted that, "* * * the transportation characteristics of iron ore * * * and scrap differ widely." We compared the two groups of commodities, 316 I.C.C. at 62-63, as follows:

> The movement of iron ore is highly concentrated. Ninety percent of the total traffic moves from seven Lake ports and three north Atlantic ports, and is delivered to the railroads by vessels in quantities averaging over 12,000 gross tons at the Lake ports and 23,000 gross tons at the Atlantic ports. The remainder of the iron ore traffic originates at eight domestic mine origins and moves in quantities amounting either to trainloads or substantial fractions of trainloads.

The entire traffic, amounting to over 60 million net tons in 1957, is delivered at approximately 90 destinations where blast furnaces are located. By contrast, scrap iron moves from many points, 501 origins in a typical month. A study made by the Bethlehem Steel Company showed 263 origins, with individual plants receiving scrap from as many as 115 origins. Although the origin and destination points for iron ore are constant from year to year, there are frequent changes in the origins from which particular mills obtain their scrap.

The average weight per carload differs widely, iron ore loading in excess of 70 net tons and scrap to 50 net tons. While iron ore moves largely over single-line direct routes, scrap moves over a multiplicity of routes, some of which are extremely circuitous. Because iron ore is frequently delivered to the railroads in quantities in excess of trainloads, it does not require the very expensive terminal services involved in way train and classification-yard services which are characteristic of the movement of any commodity such as scrap, where the typical movement is a single carload. Both iron ore and scrap are transported in open-top equipment, but this is true of about 58 percent of all the carload traffic within official territory. Iron ore rates have never been related to the rates on scrap, but have been designed to suit the needs of the iron ore traffic, ex-lake, ex-tidewater, and locally within eastern territory, and in the light of the competition between lakefront and seaboard mills, on the one hand, and interior furnances, on the other.

In *Price-Watson* v. *Elgin, J. & E. Ry. Co., supra,* we concluded:

The rates on scrap iron and on other raw materials of the steel industry have always been made to reflect circumstances and conditions particular to each transportation service. The complainants' rate comparisons relate almost exclusively to long hauls. As pointed out, scrap iron within official territory moves mostly for short hauls, which is not true of the other traffic with which comparison is thus made. An analysis of the short-haul movement in the traffic study shows that

out of a total of approximately 4,300 carloads which moved for a short-line distance of 50 miles or less, about 3,200 moved for the account of members of the Institute. The rates at which the traffic moved reflected an average of approximately 10 percent of first class. Many of the rates shown by the complainants are between points where there is no movement. For the most part, the prevailing scrap iron rates at the 87-percent basis are lower than the pig iron rates, despite the fact that pig iron has an 18-percent higher average loading than scrap iron. Moreover, some of the pig iron rates used for comparative purposes have been reduced to meet water competition; for example, the water-competitive rates from Buffalo, N.Y., to Philadelphia and Baltimore, and the water-truck competitive rates from Buffalo to Coatesville and Phoenixville, Pa.

Undue preference and prejudice must be shown by clear and convincing evidence. Substantial similarity in transportation conditions, and a real disadvantage by reason of the assailed rates, must be shown. Such a showing has not been made on this record. * * *

When the railroads sought our authorization for the general rate increases of 1969, the Institute of Scrap Iron and Steel, Inc., reiterated the contention that the rates on iron and steel scrap were prejudicial, pointing to, among other things, the iron content of such scrap and iron ore as a further basis for supporting the claim of discriminatory pricing. In *Increased Freight Rates, 1969,* 337 I.C.C. 436, 474 (1970), we held:

> We find no merit in the Institute's contentions. In the context of the issues in this proceeding we cannot go behind the basic rates in effect November 17, 1969. Moreover, the basic rate structures for iron ore, pig iron, and scrap iron are entirely unrelated. *Institute of Scrap Iron & Steel, Inc.* v. *Akron, C. & Y. R.,* 216 I.C.C. 55. As in Ex Parte No. 259, we conclude that, "while the rates on these various commodities are not necessarily related, we are of the opinion that, under current conditions, and where the issues involve the increase in contribution necessary to meet a revenue

need, the burden should be imposed in substantially similar fashion." (332 I.C.C. at 743). The uniform 6-percent increase applied to the basic rates on these commodities will accomplish this purpose. We find no violation of section 2 or 3 in the manner in which the 6-percent increase has been applied on iron ore, pig iron, and scrap iron.

In the next general increase proceeding, begun after the enactment of the National Environmental Policy Act of 1969, the Institute added the argument that its allegation of discriminatory pricing was further buttressed by the provisions and purposes of that legislation. In *Increased Freight Rates, 1970 and 1971*, 339 I.C.C. 125, 205 (1971), we said:

> Protestants assert that a low-grade commodity such as iron and steel scrap is extremely sensitive to changes in freight rates. Between 1961 and 1966, when there were no general freight rate increases, the price of scrap fluctuated between $24 and $39 per ton. The price of No. 1 heavy melting scrap increased from $27.64 per gross ton in 1967 to $43.50 in 1970, an increase of nearly 60 percent, in spite of the increased freight rates during that same period. The prices of pig iron and iron ore advanced only slightly. In addition, protestant's figures for the ratio of purchased scrap consumed show erratic behavior during thase years. The position of purchased scrap improved from 19.9 percent in 1966 to 20.3 percent in 1967, and again to 20.9 percent in 1968, followed by a drop to 19.4 percent in 1969. The only conclusion warranted on this record is that there is little, if any, correlation between rail freight rates and the market for iron and steel scrap. We are not persuaded that rail freight rates on scrap have any material impact on the decisions which result in removal of wrecked automobiles and other scrap metals pursuant to antipollution measures.

Responding specifically to the suggestion that their iron content required similar rates on iron and steel scrap and iron ore, it was concluded, 339 I.C.C. at 207:

There are differences in the transportation service performed by the railroads in connection with ferrous scrap and iron ore, including differences in the average length of haul, average weight per car, average size of shipment, and regularity of movement and general distribution. Evidence offered by the protestants, including testimony of expert witnesses, generally to the effect that all metallic sources compete, is not persuasive of their contention that scrap iron and iron ore specifically and directly compete to the extent that they require similar rate treatment. In the light of the demonstrated intervening processing required of ore to transform it into a competing product, we adhere to our conclusions in *Institute of Scrap Iron & Steel, Inc.* v. *Akron, C. & Y. R.*, 316 I.C.C. 55. In our recent decision in Ex Parte No. 262 we found that a uniform percentage increase applied to the basic rates on both scrap iron and iron ore was equitable to both. We are not persuaded that the competition between these two commodities is so direct as to require any different finding in this proceeding.

In our earlier report, served October 4, 1972, we noted, 341 I.C.C. at 408-409, that the Institute again was advancing its argument of alleged discrimination between iron ore and iron and steel scrap based upon their metallic content:

> According to protestant, the Battelle formula presents a fair basis for relating the competition between ore and scrap as metallic sources. Thus, iron and steel scrap and iron ore are competitors in the sense that they both yield iron units usable at a profit in the steelmaking process. The main difference between the competitive inputs is that iron ore requires reduction from oxide to metallic form prior to use; the reduction of iron ores confers equivalence with the iron found in ferrous scrap.
>
> Battelle reduced the metallurgical formula to an equivalence reflecting the estimated share of rail movement of the various commodities: thus, 74 percent of the scrap iron and steel consumed moves by rail, 58 percent of iron ore, and 65 percent of metallurgical

coal. Again, we are not persuaded that this distinction is necessary or proper. Battelle utilized the 1-percent waybill statistics for 1966 to determine average revenue per hundredweight for each commodity: 20.6 cents for scrap, 8.2 cents for iron ore, and 14.2 cents for coal. When these revenue data are inserted into the adjusted equivalence formula, the rate equivalence fails by the amount of $1.49 per ton. Thus, Battelle concludes the rate structure is, on the average, prejudicial against the movement of iron and steel scrap, or prefers the movement of iron ore, by $1.49 per ton. On the basis of this $1.49 rate disadvantage for scrap at the 1966 level, Battelle concluded that the excess cost per net ton of raw steel made from purchased scrap is $4.21. In terms of relative importance, it is generally estimated that the cost to manufacture a net ton of raw steel is approximately $69 to $74 per ton of ingot. Thus, on this basis, the impact of the railroad rate differentiation amounts to approximately 6 percent of total costs.

We recited the railroads' response, 341 I.C.C. at 409-410, as follows:

In rebuttal, respondents apply the basic Battelle formula to demonstrate that the proposed percentage increases actually favor scrap iron in relation to hot metal in terms of total transportation costs. As stated, the Battelle formula equates 2,000 pounds of ferrous scrap with 3,167 pounds of iron ore plus 602 pounds of coal. The latter are stated as the components required to produce 1 ton of hot metal, or molten pig iron. The application of the proposed 4-percent increase to 2,000 pounds (1 net ton) of scrap iron would mean an increase of 20.92 cents. The 4-percent increases applied to 3,167 pounds of iron ore (average rate $3.29 per gross ton) and 602 pounds of coal (average rate $3.45 per net ton) totals 22.8 cents.

Effect of Percentage Increase on Scrap Iron and Components of Hot Metal

2,000 pounds of scrap iron — Average rate $5.86 gross ton
Average rate $5.23 net ton

$5.23 net ton × 1 ton = $5.23

3,167 pounds of iron ore (1.5835 net tons) — Average rate $3.29 gross ton; Average rate $2.94 net ton

$2.94 net ton × 1.5835 net tons = $4.655

602 pounds of metallurgical coal (0.301 net tons) — Average rate $3.45 net ton

$3.45 × 0.301 = $1.04

Equivalents

		Iron ore, 3,167 pounds
		Metallurgical coal 602 pounds
		$4.66 iron ore
Scrap iron 2,000 pounds		1.04 met. coal
	$5.23	$5.70
	0.04	0.04
Effect	20.92 cents	22.80 cents

In the interim we have further analyzed the data submitted by the Institute and the railroads, and our analysis varies somewhat from those offered by these parties. As will be seen, this analysis is set forth in a subsequent section of this report after a discussion of the iron and steel scrap industry and iron and steel scrap technology.

The transportation characteristics and consequent rate treatment of another recyclable commodity, fly ash, stand in sharp contrast. Fly ash is a waste byproduct which results from the combustion of pulverized coal. It has a shipping weight of 70 to 75 pounds per cubic foot and will load in excess of 70 tons in a standard hopper car. It is an inert material which ordinarily moves in carload lots. It has had a constant value of $1.50 per ton for many years. In sum, fly ash is an extremely low-value, heavy-loading commodity which is not susceptible to theft and poses no threat of loss or damage claims. Since it is an inert material, it is not perishable.

Fly ash moves in either open or covered equipment depending on its ultimate use. If it is to be dumped as a waste, open equipment will suffice. However, it is handled most advantageously in covered equipment. If it is to be used commercially in a mixture with cement or as an asphalt

additive, it must be shipped dry. If open cars are used for dry shipments, they must be covered to prevent the fly ash from blowing away or getting wet.

Fly ash is lower in value per ton than other commodities with similar pozzolanic uses, *i.e.*, sand, $1.56; gravel, $1.89; crushed stone, $1.78; and volcanic ash, $1.85. In addition, fly ash ordinarily moves longer distances than these competitive commodities. In view of the low value of fly ash and the existence of readily available substitutes which can be produced locally, the level of rates is a crucial factor in the movement of fly ash.

In summary, fly ash has very favorable physical transportation characteristics. However, it requires the use of covered hopper equipment which is more expensive to the railroads. In addition, its low value and the availability of low-value substitutes presents a severe limitation on its ability to absorb transportation charges.

Fly ash has been included in the Uniform Freight Classification since 1939 at 17.5 percent of first-class rates, in carloads, minimum 50,000 pounds. However, almost all movements of fly ash have been on lower commodity rates.

The first comprehensive investigation of fly ash rates took place in 1954 under the heading *Fly Ash from Chicago and Trenton, Mich., to Official Points,* 292 I.C.C. 349. This proceeding embraced five additional investigations of rates, including one initiated by the Commission on its own motion to arrive at a level of rates for application throughout the country.

The Commission examined the level of rates on fly ash then prevailing in the various rate territories, found to be as follows:

Distance	Official Territory Industrial Sand Scale	Southern Territory No. 28300 Class 17.5
200 miles	317 cents	520 cents
400 miles	414	720
800 miles	559	1060
1000 miles	619	1200

Distance	Southwestern Territory Exceptions Class 12	Western Trunkline Territory Exceptions Class 12
200 miles	421 cents	467 cents
400 miles	551	653
800 miles	788	996
1000 miles	875	1120

It was found that numerous commodity rates at lower levels existed in all territories which moved most of the traffic.

The carriers were seeking a dual basis of rates on fly ash dependent upon the type of equipment utilized and whether or not the fly ash had value as a pozzolanic material. The basis was supported by the cement interests, because fly ash displaces a portion of cement and has similar transportation characteristics. The shippers were seeking rates based on the industrial sand scale which ranged from 7 to 9 percent of first-class rates.

The Commission prescribed rates that were 9.5 percent of first-class. The Commission looked to the level of commodity rates that was moving the traffic and the level of rates on similar low-value, heavy-loading commodities to determine a just and reasonable rate. The prescribed rate basis was approximately the same as coal cinders and industrial sand with some allowance for the cost of using more expensive covered equipment. The object of this rate basis was to permit the free movement of fly ash in competition with other pozzolans and other low-value commodities. The Commission refused to adopt the cement scale because fly ash has more favorable transportation characteristics and a lower value. Marketing conditions were assessed as well as the relative lengths of haul for the two commodities.

This prescription of rates has survived to this day subject to subsequent general freight rate increases. In Ex Parte No. 212, *Increased Freight Rates, 1958*, 302 I.C.C. 665, 696, the Commission acted to preserve low rates on long hauls of fly ash by ordering a 3 percent increase with a maximum or holddown of 20 cents per ton. It was specifi-

cally noted that fly ash often had to move greater distances than sand, ground limestone, or volcanic ash. Fly ash was again limited to a 3 percent increase in Ex Parte No. 259, *Increased Freight Rates, 1968*, 332 I.C.C. 714, 778, 779. In Ex Parte Nos. 265 and 267, the Commission reiterated the fact that fly ash is one of the lowest value commodities moving by rail and that its f.o.b. price at Chicago was $1.50 per ton. Fly ash rates were held down below the full increases authorized for other commodities. In Ex Parte No. 281, *Increased Freight Rates and Charges, 1972*, 341 I.C.C. 288, 427, 428, the 6-percent request of the carriers was pared down to 3 percent because of the low value of fly ash and environmental considerations.

Fly ash rates have been prescribed and maintained by the Commission at an extremely low level based on traditional classification principles. Both transportation characteristics and value of service considerations have played important parts in the movement of fly ash at low rates. Unfortunately, marketing conditions for fly ash have not improved substantially and the railroads cannot afford to subsidize the disposal or long haul of this low-value commodity. More efficient local use of fly ash seems to be the answer to the problems facing fly ash shippers. The rates on this commodity have been accorded the utmost scrutiny by the Commission and are in line with those of other similar commodities.

Consideration of the transportation characteristics and the consequent rate treatment of iron and steel scrap, on the one hand, and, on the other, fly ash, offered as illustrative of the several categories of recyclable commodities, refutes the contention that the railroad rate structure discriminates against secondary materials in favor of primary materials. As we have sought to demonstrate, a mere disparity in the rates between them means very little in determining whether there is unwarranted preference and prejudice, but we find little more than such rate differences offered in support of the charge of bias. We conclude there is no discrimination in the railroad rate structure applicable on recyclable commodities.

Before turning to a consideration of the several groups of commodities suitable for recycling and a determination

of whether the very limited percentage railroad rate increases we have approved for them will restrict their movement in relation to primary materials, we deem it appropriate to pause and consider the contention of some of the parties that the percentage increases we have authorized in railroad general rate increase proceedings the last several years have aggravated the disparity in the rates applicable to the recyclable and primary materials. The argument goes that the alleged bias that discriminates against the former to the advantage of the latter has been accentuated by the percentage increases that we have permitted the Nation's railroads to take. We find no merit in the argument.

Let us assume further that there are two commodities, commodity A, the recyclable product, and commodity B, the primary material. Let us assume from a rate base at which the rate on the former was 50 cents greater than the rate on the latter, the Commission authorized five successive increases of 10 percent each.

Increase	A	B
Base	100	50
1st	110	55
2d	121	61
3d	133	67
4th	146	74
5th	161	81

The argument goes that at the end of the fifth increase the difference between the two commodities is 80 cents rather than 50 cents, to the evident disadvantage of commodity A.[12a]

[12a] One conceivable alternative might be the authorization of increases only of equal amounts on both commodities, so as to maintain the 50 cent differential, perhaps, as follows:

Increase	A	B
Base	100	50
1st	110	60
2nd	121	71
3rd	133	83
4th	146	96
5th	161	111

(footnote 12a continued on next page)

Analysis of our cases will show, we are confident, that we have tempered the percentage increases with maxima and so-called holddowns found warranted upon a thorough consideration of all pertinent facts and circumstances. Such, of course, is our action herein, for we have held the rates on recyclables to no more than 3 percent, whereas we have authorized other increases, increases on nonrecyclable commodities, up to 6 percent.

An indication that such has been the pattern of rate increases is demonstrated by a comparison of the average revenue earned by the Nation's railroads on iron ore and iron and steel scrap. Both on the basis of the revenue per hundredweight and on the basis of revenue per carload the actual increase and the percentage increase in the earnings of the carriers between 1964 and 1969 was less for the recyclable materials than for the primary.

	Iron Ore		Iron and Steel Scrap	
	Revenue per cwt.	Revenue per car	Revenue per cwt.	Revenue per car
1964	8.6	125	20.7	216
1965	8.9	134	20.6	216
1966	8.2	125	20.6	218
1969	11.4	174	22.5	246
Difference 1964-1969	2.8	49	1.8	30
Percentage increase	33	39	9	14

Source: Carload Waybill Statistics

Obviously, such an arrangement, satisfactory to the shippers of recyclable products, would be wholly unacceptable to the shippers of the primary material. The reason for their displeasure is quite evident, for, whereas at the outset the rates bore a relationship of 2 to 1, they ended up approximately 3 to 2. Moreover, the latter scheme may give an unwarranted windfall to the railroads, particularly if the primary material moves in considerably greater quantities than the recyclable products. The answer seems to lie somewhere between the two extreme of our illustrations, and we believe this is where our decisions have tended to be.

I. The Environmental Impact of the Proposed Actions

The remaining questions to be explored in this proceeding,[13] are: (1) whether increased rail freight rates will divert traffic from the railroads to other modes of transportation in degradation of our human environment, and (2) whether the proposed increased rail rates will adversely affect the movement (and hence, it is argued, the recycling) of secondary materials. These are the essential environmental questions here involved. Pursuant to our duty under the NEPA, we shall consider them fully in order to develop the full range of impacts of the proposed rate increases unfettered by the traditional areas of our jurisdiction or expertise.

In this connection, the following from the prior report in this proceeding (341 I.C.C. 319-320) is apposite.

> Neither of these fundamental questions can be answered, we believe, without some reasoned consideration of how the responsibility for protecting the environment should be apportioned among the larger segments of our society. The rail carriers contend in this connection that the industry creating the waste in the first instance should bear the complete responsibility for disposing of such waste. On the other hand, industrial concerns and other shippers aver that they are fulfilling their environmental responsibilities by conducting environmental research, and that the railroads should bear the burden of transportation costs so that funds are not diverted from industry environmental research. These interests both contend that they are deeply concerned with the environment, but each would prefer to leave any sacrifices for ecological protection to its counterpart. In fact, however, environ-

[13] The decision of the court in *S.C.R.A.P.* v. *United States*, *supra*, which has been appealed to the Supreme Court, involved the environmental impact of the 2.5 percent surcharge. As noted above, the court stayed the effectiveness of the surcharge and concluded that the damage done to the environment is likely to be irreparable and cannot be undone by subsequent rebates to shippers since once raw materials are extracted from the ground and used, they cannot be returned from whence they came. It should be noted, however, that our findings with respect to the selective increases apply with equal, if not greater, force to the impact of the surcharge upon the environment.

mental improvement is a national goal and all segments of our nation—including industry, the railroads, governmental organizations, and private citizens—must cooperate to achieve that end.

We are of the opinion that the creator of waste properly should be called upon to bear a major responsibility for disposing of that waste in an ecologically sound manner. Of course, other segments of our economy must not construct unnecessary or undesirable barriers to the economic disposal of such commodities. The railroads have transported waste and scrap products at just and reasonable rates for many years—indeed, before environmental aims became fashionable—and the increases approved in this proceeding will not, in our judgment, adversely affect the environment.

As we shall develop hereinafter, we are convinced from our study of the record, as well as our analysis of the evidence there presented in the light of all available source material (identified in Appendix A to this report), that secondary materials, as well as the other commodities involved, will continue to move by rail with the same or greater frequency as before,[14] despite the selective rate increases we have approved. We further find that, without the increases approved in this proceeding, the railroads would be unable to provide the shipping public with the economical, efficient, and responsive service it requires, and the National Transportation Policy requires us to assure it. This nation would then be confronted with both economic and environmental crises. The services and operations of railroads unable properly to finance their activities necessarily will deteriorate, and either the traffic will then be diverted to other modes of transportation or it will not be transported at all. The following tables illustrate the revenue position of the railroads and the effect the overall pro-

[14] This conclusion results from our consideration of the present and future economic and environmental effects of the proposed action and not merely the incremental change in the situation since the last rail freight rate increases were permitted. We have explored the entire panorama of increased freight rates and the environment as well as the cumulative effects that past freight rate increases and the proposed increases have had and are likely to have upon the quality of the environment.

posed increases on all commodities were expected to have on these revenues.

TABLE 1

Railroads development of estimated revenue yield

Item	United States	Eastern District	Southern District	Western District
1. Revenue ton-miles, Jan.-June, 1971 (millions)	382,871	124,856	71,611	186,404
2. Percent first half of annual ton-miles (based on experience in most recent 4 years)	50.0	50.6	50.6	49.4
3. Estimated annual ton-miles (millions) (line 1 ÷ line 2)	765,000	247,000	141,000	377,000
4. Average revenue per ton-mile 2d and 3d quarters (X-267-B level) (cents)	1,597	1,825	1,466	1,503
5. Annual freight revenues (millions) (line 3 × line 4)	$12,241	$ 4,508	$ 2,067	$ 5,666
6. Yield of full surcharge (2.5 percent × line 5, less lumber adjustment)	$ 299	$ 112	$ 52	$ 135
7. Average percent of selective increases	4.0	4.1	3.5	4.1
8. Yield full selective increases (line 7 × line 5)	$ 489	$ 185	$ 72	$ 232
9. Adjusted yield surcharge (line 6 × 0.82)	$ 246	$ 92	$ 43	$ 111
10. Adjusted yield of selected increases (line 8 × 0.82)	$ 401	$ 152	$ 59	$ 190

TABLE 2

Annualized	United States	Eastern District	Southern District	Western District
		(millions)		
Yield of surcharge	$ 246	$ 92	$ 43	$ 111
Yield of selective increases	401	152	59	190
Total cost escalations	1,457	594	244	619

These increases were anticipated to cover only 28 percent of the railroads' increased costs. Among such increased costs, the National Industrial Pollution Control Council reported that in 1969 and 1970, the railroads spent approxi-

mately $10 million a year to control and eliminate pollution; and that from 1968 to 1970 the railroads made capital improvements for environmental purposes costing $55 million. Furthermore, labor costs are expected to rise by $635 million in 1973, because of general raises accorded workers by new union contracts which provided for a 5 percent general raise on October 1, 1972, and a 25 cents an hour raise on April 1, 1973. Battelle concludes, and we strongly agree, that it is doubtful that the problems of the secondary commodities industry can be satisfactorily solved before the underlying problems of the railroad industry are remedied. The rails must move commodities at just and reasonable rates and should make a reasonable effort, wherever practicable, to promote the transportation of secondary materials. As we shall consider more fully, to direct them to do more would be to require the rail carriers to bear the environmental burdens of their customers. Many, if not most, of these carriers are financially incapable of assuming those burdens, and it is our statutory responsibility to preclude any course of action which might jeopardize the railroads' total ability and duty to serve the public.

A. Diversion from Rail to Truck—General

It is urged that the approval of all or part of the railroads' proposal selectively to increase their freight rates and charges will divert traffic to truck transportation and thereby further despoil the environment. This argument, in our judgment, is simplistic and speculative, and we reject it. On this subject the following appears in the prior report (341 I.C.C. 321):

> It is true that the trend of traffic has been away from the railroads. During 1971, the Class I line-haul railroads (railroads with annual operating revenues of $5 million or more) carried 5.9 percent fewer tons of revenue freight than during 1970, a decline from 2,613.6 million tons to 2,458.6 million tons, and revenue ton-miles decreased 3.6 percent, from 762,544 million ton-miles to 739,391 million ton-miles. Transport Economics, March-April 1972, page 7. The trend is more pronounced and of longer duration in terms of the rail-

roads' share of the transportation market. In 1970, the railroads handled less than 40 percent of the total intercity ton-miles of freight transported by all modes of carriage, public and private, a decline of 7 percent from the 43-percent share of the market that the railroads enjoyed ten years earlier, in 1960. (85th Annual Report, 1971, page 119; 79th Annual Report, 1965, page 141). In contrast, during that same period the truckers retained their share of about 22 percent of the transportation market, with an actual increase in the ton-miles transported by them from 285 billion to 412 billion, an increase of 45 percent. *Id.* We do not think these marked shifts in traffic patterns fairly can be attributed to only the railroads' pricing policies.

Motor vehicle transportation long has been recognized as offering numerous inherent advantages over rail transportation. *Schaffer Transportation Co.* v. *United States,* 355 U.S. 83 (1957). These include the speed, flexibility, and smaller cargo units peculiar to that mode, and the developments of the past decades in these areas have definitely favored truck transportation over rail transportation as a growing medium of intercity carriage. The truckers' ability to effect rapid deliveries has been vastly improved by the completion of much of the Interstate Highway System and the greater speeds that the vehicles operating over it are able safely to achieve and maintain. The unique ability of trucks promptly to perform door-to-door service has been closely related to the accelerated dispersal of industrial plants and commercial establishments into suburban and rural areas, often removed from rail lines. Finally, improvements in small containers and demountable truck bodies are infinitely more responsive to the needs of those shippers who do not ship in quantities sufficient to enable them to tender carloads of freight to the railroads.

By the same token, railroad service to some extent has been deficient. Our report in *Increased Freight Rates, 1970 and 1971, supra,* at 156, noted a number of areas in which shipper complaints had been numerous and where appreciable improvements were required, including particularly terminal delays, interchange delays, erratic delivery, and deliveries not reasonably timed or spaced. Similarly, our

decision in *Investigation of Adequacy of Freight Car Ownership,* 335 I.C.C. 264, (1969), 335 I.C.C. 874 (1970), aff'd., *United States* v. *Allegheny—Ludlum Steel Corp.,* 406 U.S. 742 (1972), called attention to the increasingly unsatisfactory performance of the railroads both in terms of car supply and their utilization. It goes without saying that shippers encountering poor service on the rails naturally are inclined to explore the alternatives and inherent benefits offered by truck transportation.

The shippers' reliance upon rail service is thus a product of many factors, all of which combine to make up what the economists term the "demand" for rail service, and the shippers' ability or willingness to divert traffic to truck transportation is expressed in the "elasticity of demand" for such service. The elasticity of demand for rail service varies and is more pronounced for shorter distances than for longer. By way of illustration, the long-haul rail transportation of livestock has all but disappeared and is now handled by truck, while that of fresh fruits and vegetables persists. On the other hand, the long-haul truck transportation of new automobiles has largely ended, having been recaptured by the rails, while that of cigarettes remains. No all-inclusive generalization is possible. See *Transportation of "Waste" Products for Reuse, supra,* at 106.

As noted in the prior report, grain and other agricultural commodities, perhaps more than any other category of freight, best exemplify the elasticity of shipper demand for railroad service. The "Big John" case of a few years ago, *Grain in Multiple-Car Shipments—River Crossings to South,* 321 I.C.C. 582 (1963), noted the increasing participation of trucks and barges in grain movements to the south, a trend which has been no less pronounced in other parts of the country. *Grain Transportation in the North Central Region,* U.S. Department of Agriculture (1961). Such product appears to be particularly susceptible of diversion from the railroads because their transportation by motor carriers or, when transported in bulk, by water carriers is exempt from economic regulation by this Commission. Aided by technological advances in the vehicles and vessels they utilize and continuing improvements of the highways and waterways upon which they operate, the exempt truck-

ers and barge lines have proved themselves to be forceful and effective competitors to the railroads in the transportation of grain and other agricultural commodities.

In the north central region comprising North and South Dakota, Nebraska, Kansas, Minnesota, Iowa, Missouri, Illinois, Indiana, Michigan, and Ohio, the railroads' share of the nongovernment grain shipped by country elevators declined from 1958 to 1963 from 68.3 percent to 57.1 percent, while that of the trucks increased from 30.3 percent to 40.8 percent. U. S. Department of Agriculture, *Changes in Transportation Used by Country Grain Elevators*, Marketing Research Report No. 724, 15 (1965). In the northwest (Washington, Oregon, Idaho, Montana, and Wyoming), the grain delivered by rail at the terminal markets dropped from 78.8 percent in 1958-59 to 76.0 percent in 1961-62, while the barge receipts increased in that 4-year period from 10.6 percent to 14.6 percent and trucks changed very little, from 10.6 percent to 9.4 percent. U. S. Department of Agriculture, *Grain Transportation in the Northwest*, Economic Research Service Study 200, 31 (1964). In the southwestern States (Arizona, Colorado, New Mexico, Oklahoma, and Texas), the railroads' participation in movements of all grains from both country and terminal elevators declined from 65 percent in 1960 to 50 percent in 1962 while the truckers correspondingly increased from 35 to 50 percent. U.S. Department of Agriculture, *Transportation of Grain in the Southwestern States by Rail and Truck 1960-62*, Statistical Bulletin No. 367, 16 and 26 (1966).

The railroads' response has been to cut their rates to meet the competition of the truckers and barge lines wherever and to whatever extent they can. Thus, as a practical matter, the exempt carriers for the past several years have set the rates for the movement of grain and other agricultural commodities. A study of the U.S. Department of Agriculture, *The Economics of Farm Products Transportation*, Marketing Research Report No. 843, (1969), confirms that, "[f]reight charges for traffic that is subject to active intermodal competition generally reflect the lowest rates at which truck or barge operations (singly or in combination) would be prepared to offer service." As that study explains:

For-hire motor and barge operators, therefore, have

> generally taken the initiative in extending intermodal competition for farm products to more and more shippers in a widening range of locations. At any time, the outer geographic limit of service is set by truck or barge costs in relation to existing rail rates, and the extention of transportation alternatives to these limits brings pressure in turn on rail carriers who respond to the actual or proposed diversion of traffic by seeking —through regulatory channels—to reduce rates or improve service or both. The reduction typically brings rail rates about into line—on a service-equivalent basis —with the lowest rates at which competing carriers can offer service over the same or alternative routes. Once such an adjustment has taken place, the specific sequence of challenge and response initiated by intensified truck or truck-barge competition is concluded. (Footnote omitted.)

Such intended competition makes it unlikely, we think, for the railroads to avail themselves of any authority here granted to increase the rates and charges upon grain and other agricultural commodities, or indeed on any commodities (including recycables), save to the extent that the level of competing truck and barge rates would enable them to do so without losing the traffic.

No less relevant to our inquiry into whether our actions herein may tend to divert traffic from the railroads is the extent to which other commodities may provide alternatives to those affected by the increases in the railroads' rates and charges. The sensitivity of demand for these materials —their demand elasticity—depends upon the degree of their suitability and/or complementary nature, the demand for the final product, and the technological constraints surrounding the production process. The cost of transportation may be only one of many variables operating in the market place, and simple historical observations can only serve as a crude guide to future posibilities.

No commodity of great importance to the railroads better reflects the interplay of the many and varied factors influencing its movement, only one of which is the level of railroad rates and charges, than does coal. This Commission frequently has noted the intense competition that util-

ity coal encounters from other energy sources and the railroads have been encouraged to innovate reduced rate proposals to stem the threat of diversion. See *Coal to New York Harbor Area*, 311 I.C.C. 355 (1960); *Coal from Ky., Va., & W. Va., to Virginia*, 308 I.C.C. 99 (1959). The rising demand for low sulfur content fuels within recent years has introduced a further factor disrupting traditional patterns of coal movements by the railroads.

The movements of utility coal by the railroads are influenced only slightly, if at all, by our authorization of general rate increases. The commitments to use rail-transported coal are long range and virtually fixed and reflect a supplier's contract to deliver a certain quantity of coal of a specified quality over the life of the agreement in a plant with burners and other facilities dedicated to the use of such coal. The railroad connecting the mine to the power plant is an integral part of the arrangement, as if it were a signatory to the agreement (which it in fact may be); and adjustments in the rates and charges for the rail-haul involved, necessitated by intervening rising labor and other costs, may be provided for by escalation clauses in no way dependent upon our authorization of general rate increases. As to this and similar traffic, we believe the fears of diversion of tonnages from the railroads as a result of the rate increases we approve herein are without foundation.

The level of the rail rates in relation to the level of the charges by truck, of course, is a factor entering into the determination of the demand for rail service. But to suggest that we should not authorize increases in the rates and charges of the railroads, compelled by rising labor and other costs, because of the diversionary effect of such action, assumes that the pressures of escalating costs have not fallen as heavily upon the truckers and that the truckers have been able to avoid increasing their rates and charges to the extent that the railroads have been forced to do. The facts as we know them support neither assumption.

We pointed out in the prior report that one "indicium of the rate increases that the truckers and the railroads have taken from 1960 to 1970 is the revenue per ton-mile that they have earned on their traffic" and we endeavored to make the following comparison (341 I.C.C. 324-5):

> For the railroads the revenue per ton-mile rose from 1.403 cents in 1960 to 1.428 cents in 1970, an increase of about 2 percent. The revenue per ton-mile for class I motor common carriers rose from 6.310 cents to 7.458 cents, or about 12 percent. Transport Economics, January-February 1972. The truckers have sought virtually semiannual increases in their rates and charges, and even as this investigation was in progress we permitted the rate bureaus representing about 85 percent of the regulated motor carriers of the Nation to publish increases ranging from 2 to 5 percent. These patterns scarcely suggest that the increases in railroad rates and charges have been the predominant cause of the diversion of traffic from the railroads to the trucks.

Assuming *arguendo*, however, that the increases in the railroads' rates and charges here approved will tend to divert traffic to truck transportation, it does not thereby follow that the environment will be further despoiled. The data on the relative polluting effect of train and truck operations are, at best, fragmentary and inconclusive.

We were obliged to consider the relative polluting effects of train and truck operations in F. D. 25896, *Bush Terminal R. Co. Abandonment*, (non-print), April 14, 1972. In our report on further consideration in that proceeding we concluded that the substitution of truck service for the railroad operations sought to be abandoned would not significantly increase the level of air pollution in the affected area. In the *Bush* decision, we found that diesel trucks emit less carbon monoxide and nitrogen oxide per 1,000 gallons of fuel than diesel trains, with amounts being similar in the other pollutant categories.[15] The *Bush* decision was reviewed by the court and affirmed. *City of New York* v. *United States*, 344 F. Supp. 929 (E.D. N.Y. 1972). This court determined that this Commission had complied "with the letter of NEPA" and that we had "fully and in good faith considered all of the steps mandated by NEPA."

Battelle Columbus Laboratories in *A Study of the En-*

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[15] This finding was based upon data derived from *Nationwide Inventory of Air Pollutant Emissions*, 1968, Publication No. AP-73 of the National Air Pollution Control Administration, U.S. Department of Health, Education and Welfare (1970), and confirmed by an EPA study, *Compilation of Air Pollutant Emission Factors*, Office of Air Programs Publication No. AP-42.

vironmental Impact of Projected Increases in Intercity Freight Traffic to Association of American Railroads (1971) assumed that locomotive diesel engine emission characteristics are not substantially different from those of truck diesels, but estimated that trucks require the expenditure of four times as much energy, on the average, as railroads in moving a gross vehicle ton-mile.[16]

The American Trucking Associations, Inc., contends that the Battelle report entitled *A Study of the Environmental Impact of Projected Increases in Intercity Freight Traffic* proceeds on the basis of a number of unsound assumptions to a number of unwarranted conclusions and misuses data to exaggerate truck impact and understate rail impact. ATA states that Battelle ignores ton-miles involved in movements to and from rail stations and involved in switching and terminal movements; that ton-miles is not a proper standard for measurement; and that Battelle ignored the competitive factors of pipeline and barge transportation. ATA avers that the Battelle study erred in assuming diesel truck and locomotive engines are the same and in comparing highway and rail construction and maintenance on a dollar basis.

As we stated in our prior report at page 326:

> Our conclusions as to the relative efficiencies of diesel-powered locomotive and diesel-powered trucks, the proponderant vehicles handling intercity freight,

[16] For each net ton-mile of freight moved, according to Battelle, it is estimated that truck emissions are presently 3.7 times as high as those of railroad locomotives, and that this factor will increase to 4.6 by 1980, as a result of increasing truck speeds. This advantage for the railroads is a result of the lower rolling resistance of steel wheels on steel rails, as compared to pneumatic tires on pavement surfaces, and the economies of scale associated with longer trains.

Nationwide Emissions from Railroad and Trucks projected:

	Total Emissions 10 tons	Freight-hauled 10 ton-miles	Grams emitted per net ton-mile
Rails			
1970	0.92	808	1.03
1980	1.15	1140	0.91
Trucks			
1970	1.74	419	3.76
1980	2.65	591	4.06

are more conservative than those of either of the foregoing studies. Relying upon the fuel consumption figures cited in the H.E.W. publication and our reported ton-mile data, we note that in 1968 the railroads transported 756,800 million ton-miles of intercity freight and consumed 3.80 million gallons of diesel fuel. That same year trucks handled 39,300 million ton-miles of intercity freight and consumed 5,350 million gallons of diesel fuel. Thus, we would calculate the relative greater ability of locomotives than trucks to transport ton-miles of freight per gallon of fuel consumed as being less than three to one.

However, the railroads must continue in existence for them to operate in the environmental interest of the public. To do this, they must have increased revenue to meet the obligations created by increased operational costs. Our analysis of the data we have available to us concerning the relative polluting effects of trains and trucks, coupled with our view that the increases we are authorizing in the rates and charges of the railroads will not appreciably divert traffic to the motor carriers, persuades us that our actions in this respect will not have a significant effect on the environment.

B. Rail Transportation of Recyclable Commodities

In this section we shall discuss the methodology employed in recycling different commodities, identify those problems that assertedly hinder recycling, evaluate the effects that the level of rail rates may have on such recycling, and determine whether the increased rail rates will have a significant adverse effect upon the quality of the human environment. We have divided this portion of our statement into sections relating to (a) recyclable commodities generally, (b) iron and steel recycling and transportation, (c) paper recycling and transportation, (d) textile waste, (e) petroleum refinery wastes and waste sulfides, (f) scrap glass, (g) nonferrous metal scrap, (h) plastics recycling and transportation, and (i) fly ash and other industrial ashes.

Recyclable commodities, generally.—The United States produces more than 4.3 billion tons of solid refuse a year.

The following chart indicates the approximate proportion of recoverable resources being recycled.

PROPORTION OF RECOVERABLE MATERIAL RESOURCES CURRENTLY BEING RECYCLED:

Material	Short tons available for recycling	Short tons recycled	Percent recycled
Aluminum	2,215,000	1,056,000	48
Copper	2,456,000	1,489,000	61
Lead	1,406,000	585,000	42
Zinc	1,271,000	182,000	14
Nickel	106,000	42,100	40
Steel	141,000,000	36,700,000	26
Stainless steel..	429,000	378,000	88
Precious metals (troy ounces)..	105,000,000	79,000,000	75
Paper	46,800,000	11,400,000	19
Textiles	4,700,000	800,000	17

Based on statistics and estimates provided by NASMI to Battelle Memorial Institute for Environmental Protection Agency Study.

The Department of Commerce states that the salvage industry (a term covering firms collecting and processing secondary materials) consisted in 1967 of 7,927 establishments, employing 79,000 people and with total sales of $4.4 billion.[17] Of these establishments 3,862 were primarily en-

[17]

Commodity	Sales ($000)	Percent of total
Iron and steel scrap	2,166,940	48.7
Copper-base scrap	895,474	20.1
Wastepaper	378,019	8.5
Waste rags, textile waste, wiping clothes ...	316,377	7.1
Lead scrap	94,989	2.1
Zinc scrap	29,334	0.6
Other nonferrous metallic scrap	227,362	5.1
Other scrap and waste materials	111,358	2.5
Total	4,453,673	100.0

gaged in handling iron and steel scrap, and 4,075 handled nonferrous metals and other secondary materials. Iron and steel scrap accounted for almost half of the total sales, and copper scrap, about one-fifth.

The Department's figures show the trend in size of establishment has been towards larger firms. Of the total firms which operated the entire year, those with sales of $500,000 or more accounted for 12.1 percent in 1958, 17.6 percent in 1963, and 21.0 percent in 1967. Nevertheless, the industry is characterized by a large number of relatively small sellers, and a smaller number of relatively large buyers. The sellers, who deal in raw material substitutes, have minimal influence on prices and thus must accept the price offered by the purchaser. This price is basically determined by demand, which in turn is influenced by general economic conditions and the relative availability and cost of primary materials. Largely because of the nature of the buyer-seller relationships and changes in demand, secondary material prices exhibit a high degree of volatility, and fluctuates from day to day, week to week, or month to month. This is in sharp contrast to the relative stability prevailing in the market for the corresponding primary materials.

Prices of secondary materials are quoted in various ways. Depending on the commodity, the freight may be paid by the buyer or the seller. Where the seller pays the freight and there is an increase, he tends to protect his position by lowering the price which he is willing to pay to the collectors or other sources of the scrap. These sources, large in number and individually small in size, have little or no influence on the prices they receive. Admittedly, the low value of these discarded waste commodities means that the freight rates tend to represent a high percentage of their value. Nevertheless, we have been unable to find evidence

CHRONOLOGICAL SUMMATION OF GENERAL RAIL RATE INCREASES AND THEIR EFFECT ON CURRENT RATES

(Rates in cents per hundred pounds)

The following table indicates the basic rates applied to recycable materials as compared to virgin materials.

Paper					
Pulpwood			Scrap		
Ex parte increase per hundred-weight	Average rate per hundred-weight		Ex parte increase per hundred-weight	Average rate per hundred-weight	net difference in rate
General increases					
Average rates prior to Ex parte 223	—	17.4	—	31.3	13.9
Ex parte 223 (Oct. 24, 1960)	½ cent	17.9	1 cent	32.3	14.4
Ex parte 256 (Aug. 19, 1967)	3 percent	18.6	3 percent	33.3	14.7
Ex parte 259 (Nov. 28, 1968)	5 percent	19.5	5 percent	35.0	15.5
Ex parte 262 (Nov. 18, 1969)	6 percent	20.7	6 percent	37.0	16.3
Ex parte 265 (Nov. 20, 1970)	do	21.9	do	39.0	17.1
Ex parte 267 (Nov. 12, 1971)	12 percent	24.4	11 percent	43.0	18.6

that secondary commodities either are being diverted to other modes of transportation or are not moving as a result of past rail freight rate increases.[18]

Differences in the rates governing the railroad movement of primary and secondary materials admittedly exist, as shown in the chart, but it should be realized that (as shown earlier in this report) equity in freight rates among competing materials does not necessarily mean equal rates.

Notwithstanding the recent freight rate increases, the total volume of waste and scrap materials increased by 57,553 carloads between 1968 and 1969, and rail tonnage on all waste and scrap materials has risen from about 38 million tons in 1966 to 41.8 million tons in 1970. The lack of effect the recent increases have had on secondary materials movements is further emphasized by the fact that the volume of scrap materials shipped increased 7.29 percent be-

[18] Appendix B contains a background of this Commission's proceedings dealing with the involved issues.

Nonferrous metal					
Ores and concentrates			Scrap		
	Ex parte increase per hundred-weight	Average rate per hundred-weight	Ex parte increases per hundred-weight	Average rate per hundred-weight	net difference in rate
General increases					
Average rates prior to Ex parte 223	—	51.7	—	65.1	13.3
Ex parte 223 (Oct. 24, 1960)	½ cent	52.2	1 cent	65.5	13.3
Ex parte 256 (Aug. 19, 1967)	2 cents	53.3	3 percent	67.5	14.2
Ex parte 259 (Nov. 28, 1968)	5 percent	55.0	5 percent	71.0	15.0
Ex parte 262 (Nov. 18, 1969)	6 percent	59.0	6 percent	75.0	16.0
Ex parte 265 (Nov. 20, 1970)	do	62.8	do	79.0	16.2
Ex parte 267 (Nov. 12, 1971)	12 percent	70.3	11 percent	88.0	17.7

NOTE: Pulpwood: Converted from cords (4,500 lbs. per cord) to hundredweight. Ores and concentrates: Converted from net tons to hundred-weight. Scrap in hundred-weight.

SOURCE: Ores and concentrates—item 13750, Tariff SWL 270-F nonferrous scrap—item 5400A. Tariff SW/W 2006-I pulpwood—item 6287.2, Tariff T/D 754, Sup. 262, paper scrap—item 75660. Tariff TL-TCR-2009-H; increase tables—Ex parte 223, 256, 259, 262, 265, 267.

tween 1968 and 1969 while total traffic increased only 0.39 percent. The problem is not transportation or collection of these commodities, but rather the development of markets for recyclables, according to Fred Berman, President of the Institute of Scrap Iron and Steel. Dr. Herschel Cutler, Executive Director of the Institute, told a Congressional subcommittee that the problem of recycling iron and steel scrap will not be solved until the steel industry states that it will buy more scrap. In a recent EPA study, *Analysis of Federal Programs Affecting Solid Waste Generation and Recycling,* this Commission was advised to grant preferential rate increases or rate holddowns for secondary materials if we determine that recovery of such

materials will *significantly* increase due to freight rate adjustments. (Emphasis supplied). We have found no basis for reaching such a conclusion in this proceeding.

Iron and Steel—Recycling and Transportation.—Perhaps the most controversial of the recyclable commodities here before us, iron and steel scrap represents the most available and greatest revenue-producing recyclable commodity. In order better to understand the unique problems relating to the transportation of iron and steel scrap for the purposes of recycling, we will first discuss the steel-making industry, steelmaking technology, iron and steel foundries, the scrap industry structure, and ferrous scrap technology, before evaluating the effects that the proposed rail rate increases are likely to have on the movements of these commodities for the purposes of recycling.

a. *Steel-Making Industry*

The iron and steel industry is comprised of four basic components: operators of integrated steel mills, nonintegrated steel mills, steel foundries, and iron foundries. Integrated steel mills operate blast furnaces in which iron ore is transformed to pig iron, steel furnaces in which the pig iron is alloyed into steel, and rolling mills which produce intermediate products, bars, and sheets of various shapes and sizes of alloyed steel for further processing by manufacturers. The four largest steel companies—U.S. Steel, Bethlehem, Republic, and Armco—are operators of integrated steel mills, for the most part, and produce over 50 percent of all steel manufactured in the United States. Although there are no statistics available which directly measure the output of integrated steel mills as compared with nonintegrated mills, the bulk of all steel is produced in integrated mills. Integrated mills usually operate several open-hearth or basic oxygen steel furnaces (BOF) in conjunction with a blast furnace, converting iron ore and other raw materials into steel at the same site. Nonintegrated steel mills have steel furnaces but do not have blast furnaces; hence, they buy either scrap or pig iron for conversion into steel. Nonintegrated steel mills usually use electric furnaces rather than basic oxygen or open-hearth furnaces to make steel. In recent years there has been

rapid growth in small, electric furnace-equipped nonintegrated mills. These "mini-mills" are located throughout the country and, as of January 1971, there were 43 in operation in the United States, producing about 5 percent of total steel production.

Steel foundries manufacture steel castings by melting steel scrap in furnaces similar to the electric steel-making furnace and molding the steel into the shape desired. Iron foundries buy pig iron and scrap to make iron castings, usually employing cupola furnaces. Most of the products of the steel industry are sold to other industries for further processing before reaching the hands of private, commercial, and industrial consumers. The buyers of the largest quantities of steel are the transportation and construction industries, who utilized over 40 percent of total steel production in 1967. See Arsen Darnay and William Franklin, *Economic Study of Salvage Markets for Commodities Entering the Solid Waste Stream,* for EPA, Midwest Research Institute, p. 5-11 (December 1970). This study concludes that the collection of ferrous scrap, which occurs in dispersed locations and the removal of impurities, such as tin, are more costly than mining and processing ores. Castings are normally sold to other manufacturers.

The Bureau of Mines reports that the consumption of scrap and pig iron decreased in 1970, because of a general economic decline. In 1969, 94,816 (thousand short tons) of scrap were consumed and 94,635 of pig iron; and in 1970, 85,559 of scrap and 90,126 of pig iron. Battelle studies show that in 1966, almost 77 percent of companies shipping scrap iron and steel used rail service while more than 78 percent employed such service, in 1971. The transportation of raw materials by percentage of firms using rail service was relatively constant during this same period.

Scrap iron prices rose from $27.64 a ton in 1967, to $47.50 a ton in 1970, without comparable price changes in iron ore or pig iron, although all were subject to general rate increases. The total consumption of iron and steel scrap increased from 73.5 million tons in 1957 to 94.8 million tons in 1969. It is predicted that United States scrap consumption for steelmaking will rise 20 million tons in the 1970's. It should be noted that increases in rates on iron ore will

result in $9.4 million in revenues a year for the railroads, while adoption of the approved rates for scrap iron and steel will result in $5.6 million a year. For integrated mills, where both ore and scrap are consumed in the manufacture of the metal, the consumption and demand for scrap are largely dependent on the costs of producing the metal from ore. In this regard, despite changes in iron and steel-making technology, prices of materials, and transportation costs, the amount of scrap in the total furnace charge has remained constant for almost 30 years, accounting for about 50 percent of the iron content in the products.

Taking the abandoned junk automobiles as an example, it has been shown that the real breakthrough there has been a technological one. The development of the auto shredder, which produces a high quality scrap with few contaminants, has encouraged steel mills and foundries to make increased use of such shredded scrap. The major remaining problem in the junk car disposal area is the removal of legal barriers concerning title to the abandoned car. The Department of Interior concludes that "it is doubtful whether a significantly faster rate of junk car disposal would have occurred without these two events, regardless of the freight rate on ferrous scrap or on the junk car bulk."

It is also pointed out that the scrap storage sites at steel mills are relatively inaccessible to trucks, and thus the use of motor carriage may not always be possible without changes at the mills. In this light, diversion of traffic to motor transportation seems unlikely.

b. *Steel-Making Technology*

Steel making begins with the mining of iron ore, coal, and limestone. Iron mined in the United States is either low-grade ore or taconite (iron in siliceous form, usually lower grade), and virtually all domestic ore is beneficiated to increase the iron content before shipment. In 1971, one-third of the ore consumed in the United States was from foreign sources. Much of the foreign ore is naturally high grade and does not need to be beneficiated. Coal is also processed before use. Coal is purified in "coke ovens," which are usually located at the steel mill.

Raw materials are transported to blast furnaces, where

the ore is transformed into pig iron. The Bureau of Mines describes the smelting process [19] as follows:

> The chemistry of the blast furnace is extremely complex. At least 12 principal chemical reactions are possible, but simply stated the furnace performs only two functions: (1) It reduces iron oxide to metal, and (2) it fuses and liquefies the charge so that metal and slag will separate. Coke is the standard fuel and reductant, and limestone and/or dolomite are the fluxes. [p. 295].

The hot metal produced by the blast furnace can be either transferred to a steel furnace at the same site, as at an integrated mill, or transported while still hot to a steel furnace nearby, or allowed to cool into pig iron.

The next step in the making of steel is the alloying and purification of the hot pig iron or steel scrap. There are three major types of steel furnaces used today: the basic oxygen furnaces (BOF), which produced 63,943,000 net tons in 1971; the open-hearth furnaces, which produced 35,559,000 net tons; and the electric-ore furnaces which produced 20,941,000 net tons.[20] Although their input requirements and economies may differ the several steelmaking processes are fundamentally identical:

> In simplest terms, steelmaking may be described as a purifying and mixing process that takes place in a molten mass. Molten iron mixed (alloyed) with carbon is treated to remove part of the carbon and other deleterious materials to form basic steel. Other elements or alloys may be added to contribute to the physical or chemical properties of the solid product (steel). The proportions of these additives, including carbon, as well as treating methods are critical and determinative of steel produced.[21]

The basic oxygen furnace (BOF) has proliferated recently to the point where it has largely taken the place of the open-hearth furnace in integrated steel mills. Its prin-

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[19] Bureau of Mines, *Mineral Facts and Problems*, 1970.

[20] American Iron and Steel Institute, *Annual Statistical Report, 1971*, p. 40.

[21] Bureau of Mines, *ibid.*, p. 295.

cipal advantage is that it requires less than an hour to heat charge, while it takes ten hours for the open-hearth. Battelle estimates that 60 percent of all raw steel will be produced by this process in 1985. As with all steel furnaces, part of the BOF charge is pig iron and part is scrap. For technical reasons, at most only 30 percent of the charge can be scrap. Spills of molten iron and steel, cuttings, scrapings, and trimmings of products before shipment usually produce enough "home scrap" [22] to supply the scrap portion of the BOF charge. It is possible to increase the proportion of scrap in the charge by preheating the scrap before it enters the furnace, as some companies are now doing. A variation of the BOF furnace, the "Q-BOP," will be able to use 20 percent more scrap in its charge, for a total of 36 percent. U.S. Steel is now building Q-BOP plants in Indiana and Alabama, but otherwise this variation of the BOF is not presently in use in the United States.

The open-hearth furnace stood as the major producer of steel for 60 years but was surpassed in steel-making output in 1970 by the BOF. Battelle estimates that by 1985 the open-hearth will account for only 10 percent of steel output. There are virtually no open-hearth furnaces being built today. The open-hearth has the ability to use from 29 percent to 100 percent scrap; typically it uses 50 percent. Sixty percent of the scrap used is home scrap, and 40 percent is purchased and brought into the mill. It appears that open-hearth furnaces will continue to operate for some time, but their contribution to raw steel output will decline.

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[22] Scrap is classified according to source. There are two major classifications: home scrap and purchased scrap. Home scrap is generated within the steel mills and foundries of the industry and comes from molten iron and steel spills and cuttings. It is reused within the mill. Purchased scrap is, as the name implies, scrap which is bought, not produced within the mill. Purchased scrap is further broken down into prompt industrial and obsolete scrap. Prompt industrial is produced as a waste by-product of the iron and steel fabricating industry. Items such as webbing from punched presses, cuttings from auto body manufacturers, and discarded pieces from construction make up this category. Obsolete scrap comes from finished products which are no longer useful and whose only remaining value lies in the salvage of their iron and steel for reprocessing. Typical items which fall into this category are: machinery, rails and railroad equipment, construction equipment, and old automobile bodies.

The electric arc furnaces has grown steadily in importance over the past two decades, as its share of steel production has increased from 7.1 percent in 1957 to 17.4 percent in 1971. Battelle estimates that electric arc furnaces will account for 30 percent of all raw steel produced by 1985. New electric furnaces are continuing to be built. In fact, the whole concept of the rapidly expanding mini-mill is based on the ability of the electric furnace to operate profitably on a small scale. The electric furnace can use either pig iron or scrap in its charge. However, because scrap is much cheaper than pig iron (No. 1 heavy melting scrap has been selling for less than half the price of pig iron), electric furnaces use about as much scrap as they can. Although electric furnaces can use up to 100 percent scrap, present consumption runs about 98 percent scrap, 2 percent pig iron. Home scrap accounts for about 30 percent of the total scrap used by electric arc furnaces; the rest is purchased.

In steel making, either raw materials, a combination of raw materials and scrap iron and steel, or scrap may be used as the basic inputs. However, scrap and ore do not enter the steel-making process at the same point, and are not interchangeable from a technological standpoint. Iron ore must be smelted into "hot metal" (molten pig iron) in a blast furnace before entering a steel furnace.[23] Scrap is put directly into the steel furnace, entering the process at the same point as, and competing with, pig iron.

c. *Iron and Steel Foundries*

Iron and steel foundries do not have blast furnaces. In 1971, foundries shipped 1,582,883 short tons of steel castings. This was not a significant change from the level of

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[23] Some attempts at using concentrated prereduced iron ores in steel furnaces have been made. The Bureau of Mines states in its *Mineral Facts and Problems*, 1970: Direct smelting of iron ore to hot metal in an electric furnace has been practiced on a limited scale in European countries such as Norway where the relative cost of electric power is low. The use of the electric furnace to melt and refine high-grade prereduced agglomerates is expected to increase where there is a demand for the production of iron or steel in limited quantities, in areas of intermittent use, and for special purposes.

Processes to convert ore directly to iron and steel are available but have not progressed beyond the pilot plant state. [p. 295].

the previous seven years.[24] The type of furnace used by steel casting manufacturers does not differ significantly from the steel-maker's electric ore furnace. Virtually the entire furnace charge is scrap.

The output of iron foundries has also remained about the same since 1964. Shipments of gray iron castings were down slightly in 1971 to 13,838,713 short tons from their all-time high of 15,935,043 short tons in 1969. Most iron foundries have cupola furnaces. The cupola furnace uses either cold pig iron or iron and steel scrap in its charge. Typically, a mixture of scrap and pig iron is used. This is because steel scrap can be used only in limited quantities, with iron scrap being the major input, although the new furnaces allow a higher proportion of steel scrap to be used. Scrap is favored over pig iron, again because of the lower price of scrap. In 1970, cupola furnaces used 86 percent scrap and 14 percent pig iron in their charges.[25]

d. *Scrap Industry Structure*

There are three major functional groups in the iron and steel scrap industry. The first group collects scrap materials and is comprised of small entrepreneurs who scavenge the countryside looking for sellable waste material, and civic groups who organize and run recycling drives (usually collecting steel cans). The obsolete scrap collected is sent either to junk yards for sorting and assembling or directly to the next major group, the scrap metal processor. There were about 1,800 of these processors in 1966,[26] located throughout the country but clustered around large urban areas. Processors are the core of the scrap industry, and deal primarily with obsolete scrap. See footnote 17, *supra*. Processors receive scrap from collectors, junk yards, and auto wreckers who obtain their cars for their spare parts value and sell the hulks to processors for the purpose of getting rid of them. The processors bundle, shred, or otherwise prepare the scrap for consumption by steel mills. They may have direct selling arrangements

[24] *Metal Statistics*, 1972, Fairchild Publications, Inc., p. 253.

[25] Bureau of Mines, *Yearbook, 1970*, p. 9.

[26] Business and Defense Services Administration, U.S. Department of Commerce, "Iron and Steel Consumption Problems," 1966, p. 3.

with particular steel companies, be owned by steel companies, or work through brokers. Brokers comprise the third group in the ferrous scrap industry. In 1966, there were about 200 brokers, three-quarters of which were both processors and brokers. Brokers usually have contracts with steel companies, agreeing to provide certain quantities of the various types of iron and steel scrap. Using their own processing facilities and purchasing scrap from other processors, the brokers arrange the delivery of large quantities of obsolete scrap to the steel mills. Brokers also arrange many of the prompt industrial scrap shipments from the fabricators back to the steel mills. A broker may not actually see or handle the scrap he deals with, and this is particularly true for the prompt scrap which is usually shipped directly from the fabricator back to the steel mills. Frequently, however, when steel is sold to a large-scale fabricator, there is an agreement between the fabricator and the mill to return the scrap directly back to the mill with no middle man. Whitten (see *Bibliography*) contends that the cost of transporting scrap iron and steel can be significantly reduced by increasing the average load per car and utilizing the railroads' incentive rates. This can be accomplished through the use of brokers, shipping associations, or freight forwarders.

The industry has adopted somewhat of a double standard regarding the rail transportation of scrap iron and steel. This standard was best enunciated by Ray Freedman, Vice President of Commercial Metals, who states that recycling would rise if rail rates were lower and the railroads had more available cars. He does not explain how the railroads are supposed to finance their new car purchases. This scrap almost exclusively moves by gondola cars. This class of rail car declined in total numbers from 294,202 in 1955, to 192,238 in 1970, a 35 percent decrease. Obviously, it is expected that the railroads could raise rates on "the other guy's" traffic. Unfortunately, this proceeding has found the finger poining in every direction except inward.

e. *Ferrous Scrap Technology*

Of the three classifications of scrap, only obsolete scrap has a technology which is independent of other industries.

Home scrap never leaves the steel mill and is completely contained within the steel-making process. This steel is necessarily generated by the mill and is always used within the mill itself. Different furnaces generate somewhat different proportions of home scrap as discussed previously. The major technological consideration concerning home scrap is the increased use of the continuous-casting method by steel companies. Continuous casting eliminates the need to cast steel into ingots, then cool and finally reheat the ingots for rolling. Continuous casting can eliminate as much as half of the home scrap generated and is increasing in use. As more steel is manufactured using this method, the need to go outside the mill and buy scrap will increase. Continuous casting is an attractive investment and will be used more as new mills are built. The extent of its future expansion is subject to much conjecture, but the most conservative estimate puts continuous casting as taking part in 20 percent of all raw steel production by 1985.

Just as the technology of home scrap is primarily dependent on its source (the steel mills), the available quantity and quality of prompt industrial scrap are dependent on the technology of the fabricator. The amount of prompt scrap depends on the manufacturer's efficiency in fabricating the final goods from the mill's immediate steel product. Prompt scrap, like home scrap, is captive within the industry. Unlike home scrap, prompt scrap is transported back to the steel mill in the form of scrap. Prompt scrap is a fairly homogenous product with known characteristics and composition which make it a highly sought form of scrap. The relevant technology for prompt scrap is indirectly derived from the fabricating industry, the steel-making industry, and the transportation industry.

Obsolete scrap is the only form of scrap which truly has an industry having technological considerations independent of other industries. Prompt and home scrap have neither major collection problems nor processing needs which are not served within other industries. The broker may buy prompt industrial scrap, but prompt scrap is normally in a form which is directly useable by steel mills and is concentrated at a point where it can be easily transported. Obsolete scrap frequently does not have these desirable characteristics. This scrap comes from iron and

steel products which have entered the inventory of products in use and which in an extremely variable amount of time, have been discarded. These obsolete scrap products must be gathered from diverse sources and then processed into forms which can be used by steel and foundry companies. This gathering, processing, and shipping of scrap iron and steel constitute the heart of the scrap industry.

As we have discussed, pig iron and scrap are similar in ferrous content and can be substituted for each other to a significant degree. Thus, the average amount of raw material inputs per ton of pig iron produced in a given year will yield the actual metallurgical equivalency of scrap to its substitutable raw materials.[27] The 1971 Annual Report of the American Iron and Steel Institute[28] indicates that the raw materials needed to make one ton of pig iron in 1971 were:

Iron ore and agglomerates	1.585 net tons
Scrap	.033 " "
Mill cinder, scale, etc.	.057 " "
Limestone and dolomite	.242 " "
Coke	.627 " "

These proportions have remained stable at least since 1962. This equation compares to one worked out by the Institute of Scrap Iron and Steel which gives the equivalency as: 1.5 tons iron ore+1 ton coke+.5 ton limestone=1 ton scrap.[29]

These relationships do not take into account the quantities of fuels and oxygen which are required to convert these materials into pig iron. In 1971, blast furnaces used in the production of pig iron: 194,568,000 gallons of fuel oil, 17,182,000 gallons of tar and pitch, 37,337,000,000 cubic feet of natural gas, 10,072,000,000 cubic feet of coke over gas, 1,512,088,000,000 cubic feet of blast furnace gas, and 207,289,000,000 cubic feet of oxygen.[30]

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[27] I.E., "x" tons of raw materials = 1 ton of pig iron = 1 ton of scrap.

[28] American Iron and Steel Institute, *Annual Statistical Report 1971*, p. 50.

[29] The Institute of Scrap Iron and Steel, "Scrap Is a Resource of our Nation," p. 2.

[30] *Ibid*, pp. 49 and 51.

However, scrap must be heated before or during the steel-making process. Because most pig iron goes into the steel furnace in molten form, the fuel inputs are left out of the equation in order to approximate the additional cost of melting cold scrap into a form competitive with hot metal.

In order to measure the effect of a change in transportation rates, the basic equivalency formula must be modified somewhat to reflect accurately the goods being transported. First, scrap iron used in the blast furnace usually comes from home scrap. Home scrap is not transported and should be deleted from the equation. Second, mill cinder, scale, etc., also originates at the steel mill and is not transported. This component should also be withdrawn from the formula. Third, coke is usually not transported. Instead, coking coal is moved to the integrated steel mill where a coke oven converts the coal to coke. Coal is the raw material which is transported to the blast furnace area. In 1971, it took an average 1.454 tons of coking coal to produce one ton of coke.[31] In order to compare the actual raw materials transported with the scrap transported, it is necessary to substitute coal for coke in the equation.[32] The .627 ton of coking coal should be multiplied by 1.454 and the product (the tons of coal per .627 ton of coke) substituted for coke in the equation. The product, .912 ton of coal, is the amount of coal transported to the coke over per ton of pig iron. Thus, the calculated 1971 equivalency is: 1 ton of scrap iron and steel=1.585 tons of iron ore and agglomerates+.242 ton limestone and dolomite+.912 ton of coal. This equation differs from that developed by Mr. T. M. Barnes (Battelle Memorial Institute) in two major ways: First, Mr. Barnes does not include limestone in his equation. Limestone is a necessary ingredient in making pig iron as has been pointed out in the above quote from the Bureau of Mines. The American Iron and Steel Institute lists limestone and dolomite along with coke as a primary in the production of pig iron (AISI *Annual Statisti-*

[31] *Ibid.*, pp. 53-54.

[32] Computations which take coke as the transported goods have also been made. In this case it is assumed that the steel company buys its coke from processors and transports it to the mill. As stated above, transporting the coal to mill is the usual method employed by steel companies.

cal Report, 1971, p. 50). There is little doubt that this should be included in the equation. Second, the volume of coal Mr. Barnes uses in his equation is a third of what is actually required on the average according to the American Iron and Steel Institute.

From the equation above, we can estimate the rail transportation cost of one ton of scrap and of its comparable raw materials. The cost to the shippers of moving their inputs to the steel mills by rail can be measured on an average revenue per ton basis. Average revenue per ton divides the sum of the revenues by the total tons shipped in order to determine a rate indicative of the average move. Revenue per ton for particular movements will differ from the average, but the average more adequately describes the aggregate rate characteristics.[33] In terms of the inputs to steel-making, the use of average revenue per ton as the measure of rail transportation cost involves several related assumptions: it assumes that all inputs receive a rail movement;[34] it assumes that the average load and distance moved are representative for each commodity; and it assumes that a receiving mill is located at the point where the average movements converge.

The average revenue per ton, when applied to the corresponding weight of the input material required per ton of pig iron, gives the average rail line-haul transportation cost for that input. These transportation costs are summed to give the total transportation cost for all the raw material inputs. This total can then be compared with the transportation cost of scrap (average revenue per ton) to determine the extent of the cost difference. By applying the proposed rate increases to the transportation costs of these commodities, the effect of the proposed rate increase on the total rail transportation costs can be estimated.

The major problem in calculating the effect of Ex Parte No. 281 proposed rate increases is the lack of current rate data. In order to obtain an average revenue per ton by commodity, it is necessary to go to the 1969 Carload Way-

[33] Dr. Herahel Cutler of the Institute of Scrap Iron and Steel (statement of March 30, 1972) and Mr. T. M. Barnes of Battelle Institute (V.S. No. 335-a) use average, revenue per ton as a measure of rail rates. See Appendix C.

[34] In general, steel mills will only accept raw material inputs by rail.

bill Statistics,[35] and update the average revenue per ton figures [36] by applying the subsequent rate increases in Ex Parte No. 262 and Ex Parte No. 265. In both Ex Parte Nos. 262 and 265, the line-haul rate increases were 6 percent across the board. Therefore, in the procedure used to develop the figures in the table below, the 1969 average revenue per ton mile is multiplied by 1.06 and by 1.06 again to account for Ex Parte No. 262 and 265 increases.

In Ex Parte No. 267 the problem is more complex because the increase was selective by region and commodity. Thus, the revenue per ton for each commodity is determined by regional moves and each regional "rate" is multiplied by the appropriate percent increase in Ex Parte No. 267. These rates are then weighted by the proportion of traffic each regional move category accounted for in 1969 (measured by tons) and added to produce the composite average rate for that commodity. The rate, after the addition of Ex Parte No. 267 increases, is an approximation of the average revenue per ton rate in effect currently.[37] The Ex Parte No. 281 selective increase is im-

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[35] Department of Transportation, *Carload Waybill Statistics* 1969, Statement TD-1, April 1972.

[36] This process actually understates the average revenue per ton of iron ore and agglomerates moving from the Mesabi range to steel mills in Pennsylvania (Pittsburgh, etc.) and in Ohio. The majority of domestically produced ore travels from the Mesabi to Duluth by rail. There it is shipped by water in deep-draft vessels to southern ports on Lake Erie. The ore is then unloaded and either used by steel mills on the lake or shipped again by rail to inland steel mills. Each one of these two movements has a waybill and is counted as a different shipment. However, it is the same ton of ore. Thus the same ton of ore has been counted twice while, in reality, moving only once to the steel mill. As a consequence, the average revenue per ton is significantly lowered by, in effect, taking the total revenue per ton of this single ore shipment and dividing it by two.

In addition, the Department of Transportation subsampled iron ore and agglomerates (1011) in the 1969 report. The subsample may have affected the average revenue per ton of this commodity. Even if the average revenue per ton indicated by the sample is over-stated significantly, it is not believed that it would materially affect the finding of higher average revenue per ton of scrap than equivalent raw materials.

[37] This procedure assumes each commodity's division of traffic by regional move category is the same today as in 1969, and that the general traffic patterns have not changed significantly. It also assumes that the railroads have

plemented in the same way as Ex Parte No. 267, multiplying the commodity regional move rates by their scheduled increases. The products are multiplied by the proportion of the commoditiy's traffic which each regional move accounted for in 1969. The regional products for each commodity are again added to the composite commodity rate.

The calculation of the transportation cost for one ton of scrap and the equivalent amount of raw materials is accomplished by multiplying the appropriate weight per ton of pig iron for each commodity by its average revenue per ton. The transportation costs of the raw materials are then added and compared with the transportation cost of scrap. The shipping cost per ton of scrap without the Ex Parte No. 281 rate increase is $5.58, while the total transportation cost of the equivalent amount of raw materials is $8.49.[35] With the present rate structure, it costs $2.91 less to ship scrap than the comparable raw materials. With the implementation of Ex Parte No. 281, the average cost of transporting one ton of scrap will be $5.38, and the cost of transporting the comparable raw materials will be $8.87. Thus, shippers would need to pay $3.04 more to transport

TRANSPORTATION COST* OF SCRAP** AND COMPARABLE RAW MATERIALS***

	1966	*1969*	*Present*	*With Ex Parte 281*
Raw Materials				
With Coking Coal:	$5.72	$6.67	$8.49	$8.87
With Coke:	5.80	7.15	8.62	9.03
Scrap	4.12	4.50	5.58	5.83
Difference:				
With Coking Coal:	1.60	2.17	2.91	3.04
With Coke:	1.68	2.65	3.04	3.20

* Average revenue per ton.

** One ton of scrap iron or steel.

*** Raw materials required to produce one ton of pig iron.

taken rate increases when they have been granted and that maximum and minimum rates have not had a significant effect on the average revenue per ton of the commodities in question.

[35] Or $9.40 if .617 ton of coke is used instead of .912 ton of coal.

raw materials than the corresponding amount of scrap. This difference is based on the actual 1971 average equivalency and the most recent available revenue per ton data. The difference in transportation costs of raw materials and scrap will increase with Ex Parte No. 281, favoring scrap by an additional 13 cents. (See table on preceding page.)

A recent study prepared for the Council on the Environment of New York City, addressing the growing problem of garbage disposal faced by that city, was reported in *The New York Times* of February 11, 1973, to have stated:

> The section on metal reclamation, written by Stephen Cheikes, says that most offers by steel companies to buy ferrous scrap iron from municipal waste are motivated by "public-relations considerations in the steel industry."
>
> "Obviously," Mr. Cheikes says, "the well-publicized environmental movement has penetrated the walls of the large steel corporations" and they are concerned about their products, such as tin cans, ending up as litter.
>
> But, he says, most of the ferrous metal is so contaminated when it ends up as garbage that it is virtually worthless.

Paper—Recycling and Transportation.—"Paper is one of the major manufactured materials consumed in the United States and the largest single component of municipal waste."[39] The United States produces about 58.3 million tons of paper a year which in 1967 comprised 42 percent (47 million tons) of all residential and commercial waste.[40] Over the decade of the 1960's paper consumption increased by 4 percent annually and it is expected to reach a total of 85 million tons by 1980.[41] In 1969, 19.8 percent of all fibrous raw materials inputs in the paper industry consisted of waste paper from industrial, commercial, and

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[39] Arsen Darnay and William Franklin, *Economic Study of Salvage Markets for Commodities Entering the Solid Waste Stream* (for EPA), Midwest Research Institute, December 1970. p. 4-I.

[40] *Ibid.*, p. 4-6.

[41] *Ibid.*, p. 4-2.

residential sources.[42] As it appears that much higher levels of paper recycling are technologically feasible, it is relevant to consider these factors which are, in fact, constraining increased recycling.

Wastepaper dealers and processors gather wastepaper from paper converters (such as envelope manufacturers and printers) and residential and commercial sources under a variety of arrangements ranging from exclusive contracts from the collection of high-grade conversion waste to the informal buying of newspapers at the processing plant which have been collected by civic organizations and others. After the paper has been collected, it must first be segregated into the five general categories of wastepaper and then sorted to remove any contaminants of unacceptable items.[43] Following the segregating and sorting operations the paper may be baled directly or after shredding or "hogging" (to increase density). High-density baling equipment compresses the paper to a density of 17 to 25 pounds per cubic foot.[44] Baling, shredding, and hogging equipment are the most recent significant additions to wastepaper processing technology. Their application improves the handling characteristics of the wastepaper and has been responsible for effective minimizing paperstock shipping costs.

"Paperstock" is wastepaper which has been collected, sorted, and graded to meet the specifications of consuming industries. There are five general categories of paperstock: mixed papers, news, corrugated, high-grade pulp substitutes, and high-grade deinking paperstock. The mixed, news, and corrugated grades are often designated as "bulk grades." The two remaining grades are simply designated "high-grade" paperstock.[45]

Paperstock is usually purchased by manufacturers at an

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[42] *Loc. cit.*

[43] *Loc. cit.*

[44] *Study to Identify Opportunities for Increased Solid Waste Utilization—Paper* (draft copy for National Association of Secondary Materials Industries), Battelle Memorial Institute, June 1972, p. 65.

[45] *Ibid.* pp. vii and 15.

"f.o.b. dealer's shipping point" price;[46] and thus the purchaser assumes the burden of transportation costs. Once the paperstock is received at the mill, it is used as a raw material in the same way as woodpulp. The fibers are separated from the original product by mechanical agitation in a water slurry. Other treatments such as deinking or contaminant removal may follow this process. The greatest increase in paperstock use in recent years has resulted from the development of a process for the deinking of newsprint for reuse.[47] While paperstock may be used in the production of almost any type of paper, only 6 percent is used to produce the same grade of paper as that from which it originated. The bulk of paperstock is used in the production of lower grades of paper and paperboard.

"Home scrap" is produced and reused within the originating paper mill. See footnote 22 *supra*. The paper industry, however, does not recognize home scrap in its data; and it is not included in any industry figures.[48] Apparently home scrap is run back through the production process without special processing.

Prompt industrial scrap is generally called "conversion waste" in the paper industry and is composed of trimmings and waste resulting from the conversion of bulk paper products into finished products, such as envelopes, books, note paper, paperboard boxes, etc. Conversion waste is high quality because of its purity, consistency, density, and fiber strength. Conversion wastes require very little processing, and large portions are used directly as pulp substitutes. The supply of conversion wastes from converting plants is generally steady and reliable, but prices vary widely, depending upon the type of scrap involved. Currently, prices in New York range from $57.50 per ton for Number 1 hard white envelope cuttings to $17.50 per ton for jute corrugated cuts.[49] In 1971, the price for all paper scrap items was 32 percent below that of 1966, in comparison to increases in freight rates of 31 percent.

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[46] "Paper Stock Prices Per Ton," *Official Board Markets*, April 22, 1972, p. 9.

[47] Battelle Memorial Institute, *op. cit.*, pp. 94-95.

[48] Darnay and Franklin, *op. cit.*, p. 4-3.

[49] "Paper Mill Supplies," *Fibre Market News*, July 24, 1972, p. 4.

"Obsolete" paper scrap, or waste in the form of corrugated boxes, newspapers, and used office papers, is the source of 60 percent of all paperstock.[50] Approximately 40 percent of the obsolete wastepaper recovered is from the residential sector, with the remaining 60 percent contributed by commercial (non-converting) enterprises. This obsolete wastepaper usually is sorted into four grades: Number 1 mixed, Number 1 news, Number 1 office waste, or old corrugated containers.[51] Prices in New York range from $1-$2 per ton for Number 1 office waste to $20-$22 per ton for Number 1 news.[52]

The principal sources of obsolete wastepaper and conversion wastes are the East North Central and Middle Atlantic States.[53] These areas contain numerous large population centers, where wastepaper is generated and paper mill outputs are consumed, as well as enough wastepaper dealers of sufficient size to collect, process, and market the supply of wastepaper. The dealer-processors tend to cluster around mills which consume mixed paper, news, and old corrugated to minimize freight costs on these low quality-low value grades, and the mills using these grades of paperstock generally locate near the population centers with their large supplies of wastepaper in order to minimize the delivered costs of their "raw materials."[54]

The economics of wastepaper processing by dealer-processors is not easily generalized. Wastepaper is received or collected from its generators under a wide variety of arrangements. While practically all recovered wastepaper is transported from generator to dealer-processor by motor carrier, the ownership of those carriers may vary from case to case. In some instances generators haul their wastepaper to the site of the dealer-processor's operations; in others the dealer-processor collects his clients' wastepaper with his own trucks; in others common or contract carriers move wastepaper from generators to the

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[50] Darnay and Franklin, *op. cit.*, p. 4-47.

[51] *Loc. cit.*

[52] "Paper Mill Supplies," *Fibre Market News*, July 24, 1972, p. 4.

[53] Darnay and Franklin, *op. cit.*, p. 4-21.

[54] Battelle Memorial Institute, *op. cit.*, p. 48.

dealer's processing site (often on backhauls). Trucks used by generators or dealer-processors are often those which are no longer suitable for long hauls, and the transportation is rendered at relatively low variable costs.[55] Wastes from paper-converting operations are often segregated into types and baled at the source. The bales are not only more dense, but are cleaner and easier to handle than unsorted bulk wastepaper. To the extent that baling at the source is practiced, handling and transportation costs to the dealers' processing sites are decreased.

Wastepaper is segregated by grade and sorted to remove unacceptable material manually at the dealer-processor's plant—probably the most expensive phase of processing.[56] Once the wastepaper is sorted and segregated, it may either be baled directly or it may first be shredded or hogged and then baled. Use of baling, shredding, and hogging equipment requires substantial capital outlay (baling equipment used in a modern paperstock packing plant may cost as much as $250,000), and a dealer-processor must handle large volumes of wastepaper to justify such investments.[57] Finally, the baled paperstock is accumulated until there are carload lots to be supplied to consumers. The baled paperstock is generally sold to mills on an "f.o.b. trucks or cars at dealer's or producer's plant" basis.

As illustrated in the following Table, uses of paperstock vary with its grade. High-grade pulp substitutes (usually conversion wastes) may be used in primary recycling or as pulp substitutes in the production of other lower grade papers, combination paperboard, or corrugating medium for corrugated board.[58] High-grade deinking paperstock is used principally in the production of lower grade papers and marginally in paperboard production. Mixed, news, and corrugated grades of paperstock are reused primarily in combination paperboard and construction paper and board. Small portions of these grades are used in low-grade paper production.

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[55] *Ibid.*, pp. 43-44.

[56] *Ibid.*, pp. 57-59.

[57] *Ibid.*, pp. 64-65.

[58] Darnay and Franklin, *op. cit.*, p. 4-41.

The materials which compete with paperstock for markets most directly are the various types of woodpulp: ground wood, sulfite (or acid), sulfate (or kraft), and semichemical. This apparent competition between woodpulp and paperstock, however, is subject to some qualifications. Paperstock is bought principally by mills which are substantially dependent on paperstock for raw materials, while integrated mills, which produce their own virgin pulp and process it into paper, use only marginal amounts of paperstock to supplement their pulp supplies. The market for wastepaper among integrated mills is not really competitive, as most domestically consumed woodpulp (89.4 percent in 1968) is produced from captive virgin raw materials.[59] Similarly, most mills which have invested large amounts of capital in equipment to process relatively low-cost paperstock can ill afford to allow their large capital investments remain idle while buying larger portions of relatively high-cost woodpulp.

The question of the substitutability of wastepaper and woodpulp is critical in a discussion of the present and potential dynamics of paper recycling. Technologically, the paper industry could accept a much higher quantity of paperstock than it does.[60] While kraft-paper producers now consume only about 5 percent of their input weight as secondary fiber, technical studies have shown that such inputs, in the form of old corrugated boxes, could be increased to between 30 to 50 percent without violating paperboard quality specifications.[61] Bleached grades of printing paper, now using paperstock as 15 to 30 percent of input fiber, can be made entirely of wastepaper recovered from printing and converting operations and data-processing centers.[62] Old newspaper can be deinked and used as the only fiber input in the production of newsprint.[63] Construction paper and paperboard can be pro-

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[59] *Ibid.*, p. 4-22.

[60] *Ibid.*, p. 4-54.

[61] *Ibid.*, p. 4-55.

[62] *Loc. cit.*

[63] *Loc. cit.*

PAPERSTOCK CONSUMPTION BY GRADE AND USE, 1967*
1,000 TONS

Paperstock grade	Paper-board	Paper	Construc-tion	Pulp	Total	Percent of total
Mixed	1,888	453	439	—	2,780	27.4
News	1,573	254	178	—	2,005	19.8
Corrugated	3,085	102	111	—	3,298	32.6
Pulp substitutes	714	191	—	42	947	
Deinking grades	128	354	—	—	482	20.2
Other grades	612	—	—	—	612	
Total	8,000	1,354	728	42	10,124	100.0
Percent of Total	79.0	13.4	7.2	0.4	100.0	

* From 1967 Census of Manufacturers, Industry Series; preliminary reports for SIC's 2611 Pulp Mills, 2621 Paper Mills, except building paper, 2631 Paperboard Mills, 2661 Building Paper and Building Board Mills; American Paper Institute, Paperboard Group; MRI estimates.

duced with a much larger portion of paperstock than the 50 percent used now.[64]

The paper industry structure makes it difficult to substitute paperstock for woodpulp. Equipment and mill locations are employed which are not flexible with regard to raw materials inputs. As discussed above, most paperstock is purchased by mills which are substantially dependent upon paperstock as a raw material and with current prices cannot afford to shift to using larger quantities of woodpulp. In addition, such mills are generally located in areas near sources of paperstock and distant from the integrated mills and their forests. The distance from pulp supplies and the resulting high freight costs further discourage the substitution of woodpulp for paperstock. Finally, purchased woodpulp supplies are not particularly dependable. Since integrated mills (which are the only sources of purchased woodpulp) sell only their excess pulp production, consumers of purchased pulp are subject to wide variations in the quantity of pulp available.[65]

Integrated mills find it difficult to increase their consumption of paperstock over the short run for a number of

[64] *Ibid.*, p. 4-56.

[65] *Ibid.*, p. 4-73.

reasons. These mills usually locate near the source of virgin raw materials to minimize their overall transportation costs.[66] One result of locating in areas generally distant from population centers is that any paperstock which is consumed must be transported relatively long distances. When the low value of paperstock, along with its transportation characteristics (low density, bulkiness, and necessity to be hauled in boxcars) are considered, it becomes clear that consumption of any substantial quantity of paperstock by integrated mills is not economically feasible. Beyond transportation, there are other cost barriers, principally those of installing the equipment necessary to process (e.g., deink or remove contaminants) any increased volumes of paperstock.[67] These two economic factors militate against the use of more paperstock by integrated mills, particularly when such mills have plentiful supplies of captive raw materials (commercial forests) from which they can produce relatively low-cost, high-quality pulp. "For these reasons," a recent study for EPA asserts, "the raw materials competition between woodpulp and paperstock is not severe and the wastepaper trade is not influenced by the activities of marginal buyers (integrated mills) of paperstock."[68]

The demand for paper products by consumers in the United States appears to be very strong. During the decade of the sixties, paper consumption grew at a rate of 4 percent per year. By 1980, consumption is projected to be 60 percent higher than the 1970 level. The demand for those products which use the major portion of paperstock in their production has not shown considerably smaller increases. During the decade from 1959 to 1969, paperboard consumption grew from 15.97 million tons to 26.33 million tons, or 65 percent.[69] At the same time, solid woodpulp board consumption increased from 8.99 million tons to 19.06 million tons, an increase of 112 percent. During the same period, combination paperboard (made from woodpulp

[66] *Ibid.*, p. 4-34.

[67] Battelle Memorial Institute, *op. cit.*, pp. 122-129.

[68] Darnay and Franklin, *op. cit.*, pp. 4-44.

[69] *Ibid.*, pp. 4-30.

and paperstock) consumption increased from 6.98 to 7.32 million tons, an increase of only 5 percent. The end result was that combination paperboard's share of the market fell from 43.7 percent in 1959 to 27.8 percent in 1969.[70] In light of the fact that the paperboard sector is the largest consumer of paperstock in the paper industry, this substantial relative decline in demand for "board" has resulted in the relative stagnation of the derived demand for paperstock.

There are several factors underlying this relatively declining demand. Improved woodpulping technology has enabled industry to utilize abundant virgin raw materials at low cost and in high quantity. As a result of this development, most paper capacity installed since 1945 has been woodpulp-based and located near virgin raw materials.[71] These new mills have taken advantage of a demand for virgin fiber which has outpaced that for paperstock in three ways:[72] First, products made from paperstock tend to expand their markets at lower rates than other products. Secondly, pulp has invaded some markets for paperstock in the area of packaging as esthetic standards have changed, requiring materials with improved appearance and purity, although the functional performance requirements have not changed. Finally, paperstock has added only one new market in recent years, newsprint.

Before turning to a discussion of the elasticity of demand for paperstock, a review or restatement of the salient factors influencing the supply and demand for paperstock is in order. Wastepaper is not intentionally produced but results from manufacturing activity and product consumption and discard patterns. The supply of wastepaper is uncontrolled and bears no direct relation to the demand of paperstock; wastepaper generation is generally the consequence of production rates in the high volume (virgin fiber) segment of the industry, while paperstock is consumed by the segment with low production rates. The total usable supply is relatively constant in the short run because

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[70] *Loc. cit.*

[71] *Ibid.*, p. 4-34.

[72] *Loc. cit.*

wastepaper dealer-processors employ only those sources necessary to fulfill the current demand and it takes time for new sources of supply to be developed in response to an increase in demand. A similar time-lag also exists when demand declines and wastepaper sources or collectors must be "turned off." Finally, wastepaper dealer-processors must compete actively for sources of the higher quality wastepaper. As a result, dealers are reluctant to relinquish good sources of wastepaper in "lean" times and have difficulty in developing new sources when demand increases. Most paper-converting operations sell all of their wastes, and the total supply of most high grades is not expandable. On the other hand, bulk grades are usually in more plentiful supply, regardless of demand conditions.

The demand for various grades of paperstock is determined by the level of output in four basic sectors of the secondary paper industry: deinked newsprint, business printing and tissue papers, combination paperboard, and construction paper and board. Markets for combination paperboard and construction paper are more cyclical than those for most other grades of paper and board.[73] Most mills are careful to avoid driving prices down sharply in the wastepaper market, however, because they are so completely dependent upon the wastepaper dealer-processor network for raw materials. It would not serve the interests of paperstock users if large numbers of dealer-processors were forced out of business. It has also been observed that products fabricated with high proportions of paperstock do not generally compete with products made of virgin fibers. As a result, the demand for wastepaper may be out of phase with supply, with the supply of obsolete wastepaper usually exceeding demand.

As the short-term supply of wastepaper is relatively unresponsive to price changes, price index changes generally indicate changes in demand for wastepaper.[74] Because short-run supplies are relatively fixed, with time lags involved in acquiring new supplies in boom times and turning off other supplies during periods of decreasing demand,

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[73] *Ibid.*, p. 4-66.

[74] *Ibid.*, p. 4-67.

prices fluctuate much more widely than consumption levels. A change in consumption levels in one segment of the paper industry may affect prices in a number of paperstock grades, particularly those in the bulk paper category. New supplies of wastepaper are integrated into the industry structure very slowly because the demand for wastepaper increases slowly.[75] Temporary increases in demand are not unusual, but generally do not last longer than a few months. Because these increases in demand are so brief, dealer-processors do not seek out new sources of wastepaper supply. In the rare event that new supplies are developed and integrated into the industry structure, prices will soon decline to a new equilibrium.

In summary, the prices and quantities of wastepaper reclaimed are determined principally by the demand for paperstock. The demand for paperstock, in turn, is a function of the demand for paper products using large portions of paperstock inputs, the current paperstock export levels, the supply and prices of woodpulp and pulp wood, and other factors. Most of the available evidence indicates that paperstock's demand is relatively unresponsive to changes in price. Except for aberrations during the Korean conflict, paperstock consumption was relatively stable between 1950-1970 with a modest long-run growth trend, while paperstock prices [76] ranged from an index of 153.9 in March 1956 to 67.0 in April and May of 1961.[77] A recent example of the relative unresponsiveness of paperstock demand to price fluctuations was the 1.2 percent increase in paperstock consumption (from .868 to .878 million tons) which accompanied a 34.1 percent decline in the wastepaper price index (from 113.2 to 74.6), between July 1966 and August 1967 (the prices discussed are "f.o.b. dealer's shipping point" prices, in contrast to "delivered" prices.)

On the basis of the one percent waybill sample for 1969,

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[75] *Ibid.*, p. 4-66.

[76] Paperstock prices fell less than 17 percent between 1966 and 1971, according to the Bureau of Labor Statistics' *Wholesale Prices and Price Indexes.* This is in sharp contrast to assertions by the National Association of Secondary Materials Industries (NASMI) that "In 1971, the price for all paper scrap items was 32 percent below that of 1966."

[77] *Ibid.*, pp. 4-68 through 4-73.

we find that the average revenue per ton mile for paper waste and scrap (STCC 4024) was 1.99 cents. The resulting average revenue per ton was $7.26 per ton of paper waste and scrap and $11.38 for pulp. The higher revenues per ton mile for paper waste may result from its lighter loads and shorter hauls. The average weight per carload of paper waste was 34.1 tons; for pulp it was 58.2 tons; the average length of haul for paper waste was 333 miles and for pulp it was 871 miles. Unless paper waste can be compacted to a greater extent, it will continue to underutilize rail car capacity relative to pulp. In terms of the average revenue per car mile received for the service of moving the car by rail, paper waste travels for 74.4 cents while for pulp the average rate is 76.1 cents. In addition, both commodities are baled and shipped in boxcars; but whereas pulp is securely baled and there is little chance of bales breaking in transit, wastepaper has a greater probability of bale breakage and would present greater clean-up problems in that event. Without comprehensive cost data, however, it is not possible to determine what portion of the apparent disparities in woodpulp and paperstock freight costs may be attributed to differing transportation characteristics.

Preliminary estimates based upon the 1969 one percent waybill sample and 1970 freight commodity statistics indicate that the portion of total wastepaper consumption in 1970 (10.27 million tons) which moved via rail was 4.18 million tons, or 39.7 percent.[78] This figure reinforces the statements made previously that the major consumers of paperstock locate near their sources of supply to minimize freight costs and assure themselves of a steady, accessible supply of their raw materials. It appears that many such consumers are located near enough to their suppliers to move the paperstock via motor carrier.

NASMI presents four comparative examples which it

[78] ICC Bureau of Economics' estimate obtained by dividing tonnage of scrap or wastepaper (STCC 4024) moved by rail in 1970 (derived from 1970 Freight Commodity Statistics) by the total consumption of wastepaper in 1970 (derived from *Pulp, Paper, and Board*, Department of Commerce Quarterly Industry Report, January/April 1972). The calculation follows:

4,180,183 tons/10,530,000 tons—.397.

earlier presented in Congressional testimony designed to show the relationships of transportation cost of selling prices of woodpulp and wastepaper. The most extreme example shows the shipment of pulp from Los Angeles to the East Coast at a transportation cost equal to 21 percent of the selling price whereas the same figure for wastepaper was 222 percent.

With respect to wastepaper, the railroads point out that NASMI's examples relating to the movement of this commodity from West Coast to East Coast are clearly not representative. More specifically, the railroads cite Department of Transportation (DOT) statistics to show that the average length of haul for wastepaper was 329 miles, and for woodpulp 865 miles; with the average revenue to the railroad per car for wastepaper to be $247 and per carload of woodpulp to be $663. The railroads assertedly have kept the freight rates on wastepaper low by publishing incentive loading rates, under which the lowest rate today is approximately the same as that available 9 years ago, notwithstanding the intervening inflation and rising costs.

The railroads also contradict NASMI's claim that the recycling of wastepaper has been retarded by freight rates. In this regard, the carriers point out two examples in which the cause of non-recycling was other than rail freight rates. In one instance, it appeared that the Garden State Paper Company offered to buy up to 5,000 tons of old newspapers a month for five years from the City of New York, but did not receive a reply to its offer. An official of the N. Y. Environmental Protection Administration is reported as saying that the City is still considering the offer, since it is interested in removing wastepaper from the solid-waste stream, but that it has not yet been demonstrated that it can accept the offer without losing money. In the other example, an editorial in the Paper Trade Journal was quoted to show that the wastepaper recycling problem is much more complex that appears at the surface. The gist of the quoted editorial is that the integrated pulp and paper mills dispose of their output at unrealistically low prices, thus leaving little room for the operation of paper mills consuming waste paper. The editorial poses the rhetorical question: "How can (the recycling-mill) sell his perfectly

adequate, but slightly inferior, products if the large virgin pulp mills are always offering their products at bargain basement prices?'' Further responding to NASMI's claim that rail transportation charges are determinative of whether wastepaper will be recycled, the railroads point out that such factors as separation of waste from other refuse, baling, and preparation for shipment add to the cost of marketing wastepaper; and that, more than any other factor, the market price of virgin woodpulp is determinative of whether wastepaper will be marketed and recycled.

The volume of wastepaper recycled annually over the past ten years has averaged about 11 million tons, which represents about 20 percent of wastepapers generated and about 22 percent of the fiber requirements of the paper industry. High grades of wastepaper encounter little difficulty in being recycled in competition with virgin woodpulp but in a poor market, lower grades face difficulty in moving. A 3-percent freight rate increase thus could have a potential to reduce demand of the lower grades, although the controlling factor in the movement of even these grades appears to be the fiber demand and available supply and price of virgin pulp.

As to the conservation effects of recycling, it has been shown that the recycling of products of non-renewable resources, such as minerals, represents true conservation, as opposed to renewable resources, such as trees. Trees are a crop and they are grown to produce wood products. They are harvested and replaced with new growth, and this activity is economically essential to the forest regions and the people dependent upon them.

Paper litter is solely the result of human carelessness and apathy. The salvaging of paper litter for recycling would be economically unrealistic, and the fibers therein are often so deteriorated and contaminated that they would be essentially unusuable. Thus the freight rate question is irrelevant to paper litter. Increased recycling of wastepaper creates additional water quality and solid waste disposal at the mills because 10-50 percent of the weight of waste paper is lost in repulping, with the lost materials including fibers as well as inks, dyes, fillers, coatings, resins, and other chemicals.

Movements of pulpwood and wood chips by railroad have decreased between 1968 (3.6 million cords) and 1971 (3.3 million cords) according to the Southwestern Paper Traffic Conference. On the other hand, Southern Railway transported about 100,000 tons more of scrap paper in 1971, than it did in 1967. Southern states that this is a result of retained rate advantages enjoyed by scrap paper over woodpulp and pulpwood. In 1966, all railroads transported 7.8 million tons of wastepaper. The volume rose to 8.1 million tons in 1970, although there are four general freight rate increases during this period.

The following chart indicates the costs and profits of transporting wastepaper by the railroads.

RAILROADS' AVERAGE COST AND PROFIT PER CAR OF WASTEPAPER

(Rate: in cents per hundred pounds)

Territory:	Miles	Rate—Maximum Weight—80,000 lbs.	Revenue Per Car	Average Cost per Car	% Profit Per Car
	96	28	$224.00	$179.20	25
Eastern	225	40	320.00	236.00	35
	298	43	344.00	280.00	23
		80,000 lbs.			
	100	18	$144.00	$114.40	20
Southern	168	22	176.00	143.20	23
	205	27	216.00	164.80	31
		50,000 lbs.			
	150	37	$185.00	$158.50	14
Western	300	50	250.00	214.50	14
	500	63	315.00	289.00	8

SOURCE: Cost Per Car—Rail Cost Scales by Territories ICI-68, updated 10 percent.

Midwest Research states the demand for wastepaper is not increasing significantly because papers made of secondary fibers are not holding their own in the marketplace, and customers often reject recycled paper products because of poor quality. In addition, used fibers cannot be employed except in the same quality product or in a product of lower quality than the one in which the scrap was originally used.

Producers of newsprint seek only the collection and reuse of newsprint, and other paper manufacturers utilize this same one-dimensional policy. Health considerations are said to constitute another limitation on the reuse of paper-making fibers. Paperboard for food cartons must be made of virgin fiber or clean, sanitary scrap from such paperboard in order to meet sanitary standards. Furthermore, in Europe and Japan where scrap paper is recycled to a great degree, product qualities assertedly are much lower and water pollution is alleged to be enormously greater than in the United States.

Paper scrap consumption may rise significantly in the 1980's if a projected shortage of virgin pulp occurs, and new technological developments prove their worth. The use of high-density balers facilitates the handling of paper scrap and provides a better product. These balers cost about $120,000 and can handle 30,000 tons of paper a year and reduce freight costs up to $5 on trips of 500 miles. This can be economical only if a business has sales approximating $600,000 or more a year. In 1963, 88 percent of 1120 companies in this business had sales under $500,000, but a centralization of these businesses has been taking place.

The Federal Government, through the General Services Administration (GSA) has changed its specifications for certain types of paper and paperboard products it purchases—principally packaging papers, paperboards and tissues—to require the inclusion of varying percentages of waste fibers in such products. This is expected not only to spur the purchase of a wider variety of recycled paper products, but also help stimulate the market demand for papers containing post-consumer waste. The GSA does not have specification or purchase responsibility for printing papers or most types of office papers. These are under the jurisdiction of the Joint Committee on Printing of the Congress, which is studying its policy on this subject.

Under its program, the GSA has divided the sources of reclaimed or recycled fibers into two classes:

Part I is commonly referred to as post-consumer waste; i.e., paper, paperboard, and other fibrous wastes after they have passed through their end-use as a consumer item. Principal among these are used corrugated boxes, old

newspapers, old magazines, mixed wastepaper, and tabulating cards. These wastes are collected prior to entering the municipal solid waste stream. However, any other paper, paperboard, or fibrous wastes which enter into and are collected from municipal solid waste also would qualify under part I.

Part II wastes, as defined by the GSA, include paper or paperboard wastes generated after the completion of the paper-making processes, including such things as envelope cuttings, and obsolete inventories of paper and paperboard. Also included are fibrous by-products of harvesting, manufacturing, extractive, or wood-cutting processes as flax, straw, linters, bagasse, chips, and other forest residues. In some instances, the GSA requires certain percentages of both part I and part II type wastes, while in others there is no requirement for any post-consumer (part I) waste. A chart showing the sources of fiber consumed by paper and paperboard mills follows this discussion on paper recycling.

There are a number of cities today involved in voluntary separation and collection efforts. Here, wastepaper is usually segregated and collected in three categories—corrugated, newspapers, and mixed papers, which include magazines. Newspapers and corrugated paper products are collected by municipalities because they can be easily separated and are readily accepted by recycling mills. Magazines and mixed papers are primarily collected because they are available in large quantities in centralized locations (office buildings, factories, etc.). Currently those cities with successful recovery programs are concentrating on recovering old newspapers from residences—before contamination—for established markets.

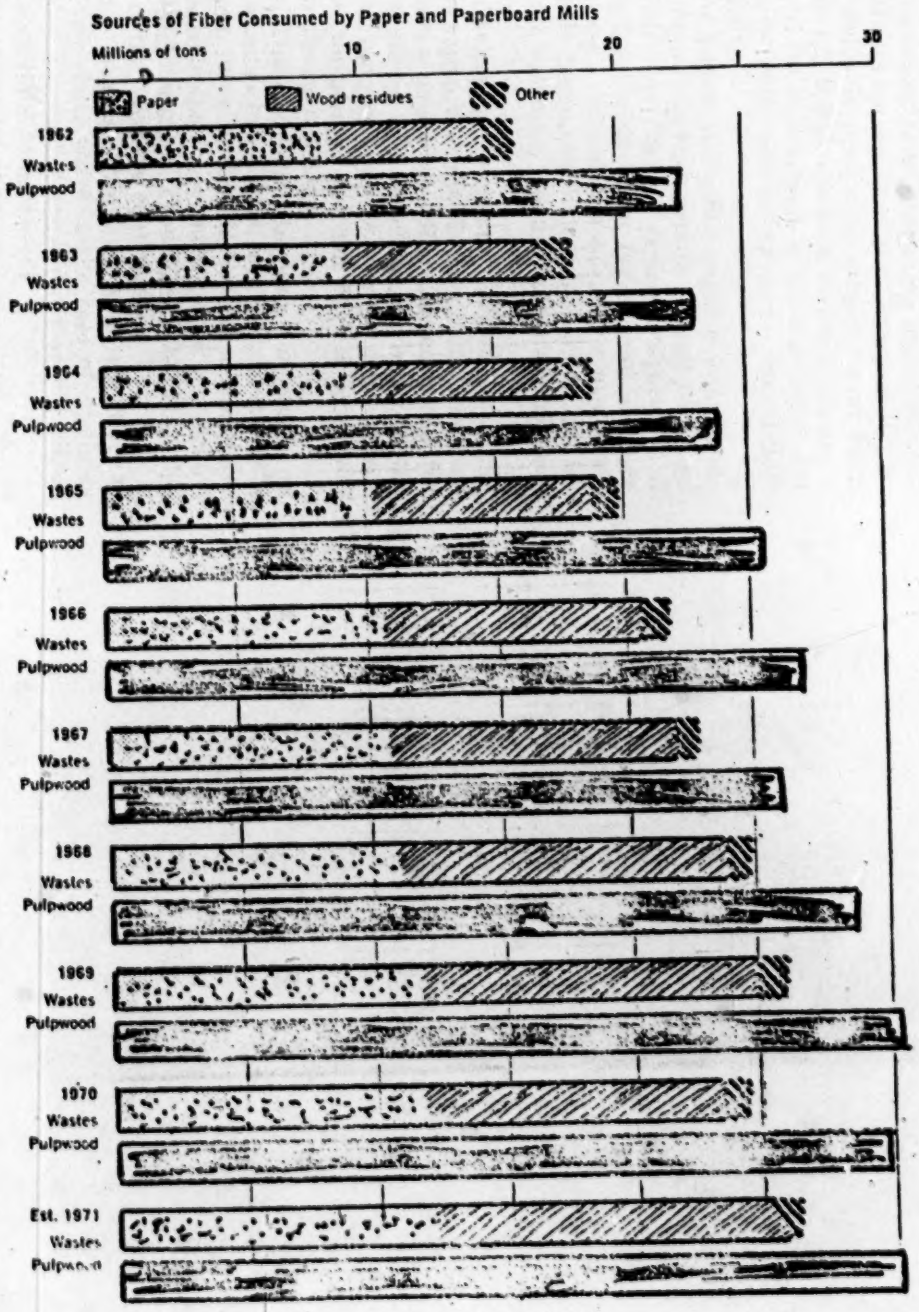
A four-year-old, sustained paper collection program is operating in Madison, Wis. There, sanitation department trucks collect bundled newspapers put out by residents on a voluntary basis. Collections are made with regular compactor trucks equipped with special racks to hold discarded newsprint during normal refuse collection. So far, participation in the program has been high, and the system is beginning to show a profit. Of the more than 3,000 tons of old newspapers collected in the City of Madison over a two-

year period, the largest portion has been repulped, deinked, and made into newsprint. A small portion was shredded and used in the manufacture of insulation material for homes and commercial buildings. The remainder was used in the production of combination paperboard.

Similar municipal recovery programs are taking place in Hempstead, N. Y., and Louisville, Ky. In Hempstead, as in Madison, newsprint is bundled by residents and collected on the same day as the rest of the solid waste. However, Hempstead uses a separate compactor truck to travel normal collection routes, picking up only newspapers. This one truck covers about five regular collection routes, compensating for the use of expensive equipment and additional labor. In Louisville, an experiment similar to Hempstead's is being undertaken where newspapers are picked up by separate trucks within various neighborhoods and shipped to processing plants for deinking and repulping. Such voluntary separation and collection systems depend greatly on there being recycling mills in the area.

For the paper that does get into the solid waste stream—and is thus contaminated—there are other means which hold promise for utilizing its value, while reducing the solid waste volume. One interesting demonstration resource recovery facility is in operation at Franklin, Ohio. Developed through a demonstration grant from the EPA and operated by the Black Clawson Company, the system processes some 40 tons of refuse each day to extract paper fibers in addition to separating out glass and metals. The recovered fibers are presently sold to a local company for use in the manufacture of roofing felt. Further processing, cleaning, and bleaching could upgrade the fibers for use in paper production. One paper company has experimented with this urban fiber and has produced printing paper from it.

Another promising use of paper and other organic components of the solid waste stream is for the energy values represented. A ton of shredded organic refuse has about one-half the BTU value of a ton of coal. Utilizing this portion of trash and garbage cannot only reduce the amount to be disposed of, but can save valuable and depletable conventional fuels. This spring, the City of St. Louis, the


Sources of Fiber Consumed by Paper and Paperboard Mills
Millions of tons
10
20
30
Paper
Wood residues
Other
1962
Wastes
Pulpwood
1963
Wastes
Pulpwood
1964
Wastes
Pulpwood
1965
Wastes
Pulpwood
1966
Wastes
Pulpwood
1967
Wastes
Pulpwood
1968
Wastes
Pulpwood
1969
Wastes
Pulpwood
1970
Wastes
Pulpwood
Est. 1971
Wastes
Pulpwood

Union Electric Company, and the EPA began a demonstration project to combine daily some 300 tons of mixed municipal refuse with coal to generate electricity from power plant boilers. Other examples of converting mixed municipal refuse into heat and energy are: (1) Chicago's Northwest Incinerator, which is producing salable steam from burning refuse, and (2) the Combustion Power Company's CPU-400 system, which is designed to process some 400 tons of refuse daily while generating more than 10,000 kilowatts of electricity.

Further uses for paper and other organic waste components include composting, high protein animal feed, and landfilling. As paper is biodegradable and compactable, it is a useful and desirable component for efficient sanitary landfills. Paper is also a desired component in conventional incineration, not only because of its combustibility, but because it absorbs the moisture found in other components of municipal waste.

Despite the continuing developments, however, we do not find any persuasive support for the allegation that increased freight rates on scrap paper will affect its movement for the purposes of recycling. We therefore conclude that the maximum 3 percent increase approved in our prior report as to rail rates on wastepaper will not have a significant adverse effect upon the environment.

Textile Waste.—The environmental issues in regard to waste textiles moments center upon whether, or to what extent, high freight rates or freight rate increases have inhibited, or will inhibit, their movement. More specifically, the statement of Mr. Edward B. Frankel of NASMI in this proceeding contains the following contentions:

1. "Freight rate increases totaling approximately 40 percent within a few short years in the face of declining markets and market values have prevented over a billion pounds of these materials from moving * * *." [79]

2. "Had freight rates not increased at all on [these] commodities, the revenue would have increased to the carriers by 58.59 percent by virtue of the same proportionate share of textile waste produced and recycled in 1970 as in

[79] Verified Statement No. 376 of NASMI in Ex Parte No. 281, March 12, 1972, Part II, p. 1.

1964. In other words, had the industry been allowed to market the increased supply brought about by the population explosion, the rail carriers would have benefited much more than by having increased rates on these low valued commodities to the point where they are of such major consequence as to preclude movement." [80]

The following assertions are made in support of the above contentions: (1) Only about 520 million pounds (below 3 percent) of discarded textile wastes amounting to 1.2 billion tons are sorted each year, and only a small fraction moves by rail; (2) freight rates at prevailing average length-of-haul (as shown in the 1966 one percent waybill sample) and minima per car are so high, in addition to processing costs relative to value of the commodity, as to preclude movement; (3) transportation costs make up a substantial percentage of the delivered costs of low-grade textile waste, as compared with the higher grade textile wastes (wiping rags) referred to in the railroads' statement; (4) textile waste traffic fell off 40 percent from 1966 to 1969 in Official Territory as a result of rate increases, while in the south where, assertedly, the carriers "recognize" value of service factors, traffic rose 4 percent; (5) rate increases have a substantial impact on the environment because, for example, in 1970 21 mills and 27 sorters and processors closed due in part to (increased) freight rates; (6) the increased rates cannot be passed on and must be borne by the processor; (7) rates on rags are scheduled to increase 6 percent, while on rag pulp (supposedly a substitute), only 3 percent; and (8) existing rates were found to be more than fully compensatory.

There is little useful information or data available on the diverse and complex reprocessed textile waste industry, or

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[80] *Ibid.*, p. 2. The fact is that if rates had not been increased between 1966 and 1969, and the 1966 loading characteristics had prevailed, the rates would have been below out-of-pocket costs for 1969 and the railroads would have been worse, not better, off.

The rate examples used on page 3 of the cited statement—at 65 cents at 40,000 lbs., 58 cents at 50,000 lbs., 564 miles—would only barely have covered variable costs in 1969 in official territory (the applicable territory of that tariff) and failed to cover full costs. Thus, it appears that a rate low enough to make the processing of used textiles in the example profitable, would have caused the railroads to lose money—to subsidize the waste textile shippers.

on the transportation of waste textiles. Primary sources of textile waste and scrap are: (1) textile mills; (2) manufacturers of apparel, furniture, etc.; and (3) social service institutions which collect discarded clothes. The primary uses for reprocessed waste textiles are: (1) padding and batting; (2) paper and vulcanized fiber; (3) cotton wipers; (4) reprocessed wool fabric; (5) flock and filer; (6) roofing and flooring; (7) used clothing; and (8) export.

The Census of Manufacturers 1967 and two recent recycling studies have estimated the reprocessed textile industry as having an annual output of 1.4 to 1.6 billion pounds. NASMI and other industry sources assert that only a fraction of textile wastes move by rail (generally estimated at 10 percent), while the balance moves by private motor carrier. However, on the basis of the 1969 Carload Waybill Sample, 1.760 billion pounds of materials were shipped by rail as "textile waste," scrap or sweepings." Obviously, most "textile wastes"[81] do not flow through the textile reprocessing industry, but are industrial by-products which are either reprocessed within integrated firms or are sold directly to users by the operator, by-passing commercial dealers and/or processors.

All sources do point, however, to a decline in the processing of used textile, despite the growth of available waste. Secondary textile waste dealers were paying as much as $120 to $140 per ton for mixed rag bundles in the mid-sixties; the current price range has dropped to between $55 and $65 per ton. Wiping cloths, padding and batting, wool waste, cotton clippings, and old and new rags used in construction material are being replaced by other products, which do not necessarily cost less to reproduce, but which provide a higher standard of performance. In addition to whatever role transportation costs might play in this decline, the following have been identified as the primary factors affecting used textile markets:

(1) Foam has replaced cotton batting and padding almost 100 percent in the auto industry in recent years; at the average of about 30 pounds per car, and on an output

[81] The 58 separately coded commodities within this group include thread, rope, worn-out mattresses, wool dust, cotton refuse from cotton seed oil, mills, tire cord, and old clothes, to name just a few.

of about 8 million cars per year, this alone would cause demand to be lower by 240 million pounds annually. In addition, the demand for reprocessed textiles for padding, upholstered furniture, mattresses, etc., appears to have fallen by about 16-20 million pounds between 1963 and 1967.

(2) Usage of rag in papermaking has been steadily declining over the years. Rag is now being replaced by woodpulp and cotton linters, which cost considerably less to produce and do not contain synthetic contamination. According to the Census of Manufacturers, pulpmills used negligible rag in 1967, and the use of rag in papermills fell 18 percent between 1963 and 1967. In the manufacture of paperboard, textile waste use decreased about 15 percent during the same period.

(3) New textile and disposable paper wipers are replacing used textiles in the wiper market by virtue of their convenience and overall cost advantage.

(4) The desire for "quality" wool products, combined with the wool labeling act and competition in export markets, has depressed the demand for reprocessed wool, even though the latter is not technically an inferior product. According to the Census, use of reprocessed wool fiber decreased almost 40 percent between 1963 and 1967.

(5) During the 1963-1967 period, the reprocessing of flock decreased by about 20 percent.

(6) The roofing materials industry, a primary market for inferior quality rag, has recently been substituting pulp for rag due to the synthetic contaminants in lower grade rag bundles (the price is too low to cover sorting and processing). The building paper industry, according to the Census, was the only industry significantly to increase its use of used textiles from 1963 to 1967; however, the synthetic contaminant problem may have been of more recent occurrence.

(7) According to a recent report, the market for used clothing, which is largely an export commodity, has been suppressed by foreign import policies.

The above information, while not quantitatively sufficient to prove or disprove the case, indicates that there was a substantial decline in the used textile market even during a period in which rail rates did not undergo a general

increase, i.e., the early to mid-1960's. This market decline, combined with accelerating technological developments and increased labor costs in this highly labor-intensive industry, constitutes sufficient evidence to indicate that nontransportation factors, not rail rates, have been the primary cause of the declining textile waste industry. Thus, the assertion that railroad rates might be largely responsible for the failure of "over a billion pounds" to move is not supported by the facts. For this reason and that indicated in footnote 80, the statement that 58 percent more traffic would have moved if rail rates had remained constant also appears unsupportable.

In addition to the technological shift, the waste textile industry appears to be continuing its geographic shift away from the northeast and into the south (a movement parallel to that of the companion textile industry). Between 1963 and 1967, total value added by the waste processing industry in the south doubled, while it declined by 16 percent in the northeast. In view of the decline in the industry, and the shift from north to south, it is not surprising that the drop in rail traffic between 1966 and 1969 registered in the waybill data took place in the Official Territory. The drop in carloads of 40 percent overstates the actual situation, however, as the average load per car increased substantially in the Official Territory. Tons moved in the Official Territory decreased less than 25 percent, but rose almost 5 percent in the south.

On the basis of the data presented in the Burden Study, average revenue per cwt. on all textile scrap in the Official Territory in 1966 was barely sufficient to cover out-of-pocket costs and covered only 88 percent of fully allocated costs. Between 1966 and 1969, while costs were kept practically constant by encouraging heavier loading of cars, "rates" (average revenue per ton mile) in the Official Territory increased about 10 percent bringing revenue to 106 percent of full costs. In the south, on the other hand, the average revenue per ton-mile was above that in the north, while unit costs were lower. In 1966 revenue was 140 percent of out-of-pocket and 120 percent of fully allocated cost on the basis of territorial costs for unequipped box cars with a 21-ton load and 250-mile haul. Rate charges increased

average revenue per ton mile only 7 percent between 1966 and 1969, while unit costs rose so that revenue fell to 132 percent of full costs by 1969. Nonetheless, as noted above, traffic in the south increased despite the increasing rates and despite the fact that the average revenue per ton mile in the Official Territory, even in 1969, was below that for the south. (Average revenue per hundredweight was slightly lower in the south, due to shorter average haul.) These averages must be used with great caution, however, since analysis of individual movements indicate a wide range of origins and destinations, types of textile wastes, and revenues. With respect to textile waste, NASMI cites two examples, the more extreme of which show the shipment of a sweepings grade of waste from Buffalo, N. Y., to Toronto, Canada. The sale price of the sweepings is stated to be $1.75 per 100 pounds while the "average freight to plant" was $0.78 and "average freight to Toronto" was $0.59. NASMI thus concludes that the freight charges equal 78 percent of sale price.

As to textile waste, the railroads state that in the examples submitted by NASMI to show that freight charges on textile waste are high, the two components of freight charges were the "average freight to plant," which appears to be a local trucking charge to bring the waste to the plant, and "average freight to Toronto," which is the rail-haul charge. As the local trucking charge was $0.78 per 100 pounds, it is argued that the long-distance rail charge of $0.59 per 100 pounds not only reasonable but is also a smaller fraction of the selling price. The example it is asserted, also tends to show that diversion to motor carriage is not likely under the present circumstances.

The railroads criticize NASMI FOR displaying "the banner of environmental protection, [while failing] * * * to indicate in any way precisely how an increase in rail rates on textile waste could possibly adversely affect the quality of the environment":

> It (NASMI) speaks of the vast accumulation of solid waste that constitutes potential recyclable material, but offers no indication that such normally discarded waste, for example, has ever moved to recycling plants by rail or that rail rates have ever been sought on such

material. No discussion at all is devoted to the obvious fact that recycling plants collect their raw materials within short radii and most often by private truck. There is manifestly no relationship between the growing accumulation of discarded textiles and rail freight rates. As to textile waste moving *from* recycling plants to industrial consumers, nothing is contained in the protest which would indicate that rail rates in the past or rail rates increased as proposed in this proceeding would operate to cause substantial diversion of traffic to truck, much less prevent transportation altogether. The railroads who share protestant's environment also share its concern for ecological improvement. They submit that the increase proposed for textile waste is in no wise inconsistent with that goal.

The increases approved herein do not apply to movements within the South where about two-thirds of the total United States textile production occurs. A 3 percent increase on a 50,000 pound shipment for 527 miles would be about $9.46 a carload, in contrast to the value of such lading of at least $5500 a carload. It is generally agreed that the so-called "substitutes" for waste textiles are replacing waste textiles for reasons unconnected with the cost of transportation.

Our conclusions are the following:

(1) Rail Transportation rates are probably of lesser importance to the declining role of this recycling industry than the technological and market problems discussed above; and unless these latter problems are solved, constant or even decreased rates are not likely to be of substantial or long-run aid to the industry.

(2) Regardless of "revenue potential," in order for traffic to be advantageous to the railroads, the revenues must at least cover the costs of movement. This the rates in several of the above examples fail to do on the average.

(3) Because of the increased use of synthetics, the cheaper bundles of textile waste are becoming less economical to sort and process, and less desirable. This trend cannot be reversed through the mechanism of transportation rates.

In summary, there is no evidence sufficient to prove the case for or against the proposed increase on environ-

mental grounds. In the absence of specific cost information, it is not possible to determine whether a particular class of waste materials is carrying a discriminatory rate. However, the preponderance of evidence indicates that the industry's problems and solutions lie largely outside the realm of rail freight rates.

Petroleum refinery wastes and waste sulfides.—Merichem is engaged in the recovery of usable chemicals from petroleum refinery wastes. It receives inbound petroleum wastes from refineries, and it ships outbound cresylic acids, phenol, and waste sulfide. This protestant would not object to the proposed rate increases on cresylic acids and phenol, if found to be otherwise warranted, but it requests holddowns on the petroleum refinery waste and waste sulfide.

This protestant alleges that it is a financially depressed firm and cannot afford to pay higher freight rates on the low-valued refinery waste and waste sulfide. Moreover, waste sulfide, which is said to compete with caustic soda and salt cake, is shipped in a diluted form of less than 20 percent concentration. Since caustic soda and salt cake are shipped in concentrated forms, Merichem contends that an across-the-board freight rate increase is inequitable because a 2.5 percent surcharge assertedly has the effect of only a 2.5 percent increase in the transportation cost of usable salt cake, a 5 percent increase for caustic soda, and 12.5 percent increase for usable waste sulfide. Merichem also asserts that past rail rate increases have caused diversion of traffic from rail to trucks and barges and that the present proposed rate increase will do so too.

More directly pertinent to the environmental issue, Merichem states that, before it came into being, the refinery wastes were released into the watersheds, causing pollution of water resources. Thus Merichem's operations not only serve the public interest of removing toxic substances from discharged wastes, but the recovered chemicals are then recycled. To illustrate its contention that freight rate increases impair its ability to remove the pollutants and recycle them, Merichem cites its discontinued collection of wastes from 11 refineries as a result of rail rate increases, where barge transportation was not available.

In sum, Merichem contends that the low-valued and dilute

refinery waste cannot bear the proposed rate increases and that the rate increases would be self-defeating due to the loss of rail traffic through diversion. It also argues that any impairment in its ability to remove pollutants from waste discharges will adversely affect the environment. Although it does not allege that the proposed rate increases are unreasonable or are not cost-justified, it requests this Commission to grant holddowns to its commodities under our power to adjust rates to meet public needs.

The railroads contend that the refinery waste and waste sulfide are already being transported at very low rates due to the carriers' favorable response to prior requests for reductions in the charges on these commodities. As examples, the railroads show that the present rate on refinery waste is about 25 percent less than the rate for residual fuel oil, another refinery by-product, between the same points.

The carriers dispute Merichem's claim that freight rate increases would cause it to reduce its operations and perhaps to go out of business. They say that Merichem has received an increasing amount of petroleum wastes by rail despite past rate increases, and that its Houston plant is now operating at capacity. Thus, past rate increases assertedly have not interfered with the collection of refinery waste nor with the distribution of recycled products. According to the railroads, the proposed rate increases will not cause any change in the handling of petroleum waste and will not have any adverse impact on the environment, but the modest increase proposed represents only a fair and reasonable share of the increased costs experienced by the carriers.

As to Merichem's claim of inequity due to the low concentration of usable chemicals in its raw materials and products, the railroads point out that it was the shipper's choice to move these commodities in dilute form. In fact, Merichem itself sought and obtained the present low rates on waste sulfide containing no more than 20 percent usable material. Moreover, the rate per ton for moving waste sulfide a given distance is substantially lower than the rates per ton for moving salt cake or caustic soda the same distance. With respect to diversion of traffic, the railroads

apparently believe that such diversion will occur whenever barge service is available.

The railroads argue that the thrust of Merichem's contention is that the carriers should subsidize the movement of petroleum wastes even if this has to be done at a rate level below costs. The carriers find it significant that when Merichem itself decided that continued collection of wastes from 11 refineries would be unprofitable, it simply stopped collecting there. The railroads suggest that the disposal of petroleum wastes should be considered a cost of doing business, and that the oil companies, who create the wastes, should bear part of the burden of disposal. It appears that Merichem is presently paying refineries for wastes and the railroads conclude that the refineries perhaps should give the wastes to Merichem free or even pay for disposal.

In response to Merichem's allegation that it is in a financially depressed condition, the railroads submitted data from Merichem's financial statements filed in Texas to show that it had an increase in sales from 1970 to 1971, and that its net income before Federal income taxes rose from about $70,000 in 1970 to more than $520,000 in 1971. The railroads also dispute Merichem's claim that refinery wastes have virtually no market value by pointing to the facts that such wastes are shipped over long distances at considerable cost and that some of these wastes can be shipped directly to paper mills for use without intermediate processing.

Finally, the railroads show that, contrary to the impression conveyed by Merichem that refineries either must sell the wastes to Merichem or dump them in the water streams, other methods of disposal are available, including one developed under an EPA grant. Most of these alternative methods of disposal, some of which have been widely used in European refineries for years, involve an element of cost to the refinery. The fact that some refineries apparently already are paying for the disposal of their wastes, instead of selling the wastes to Merichem, is analogized by the railroads to the practice of petro-chemical plants which pay for the disposal of wastes they created.

Statistics show that rail shipments of petroleum wastes to Merichem rose from 97.3 million pounds in 1969 to over

100 million pounds in 1971. A 4 percent rate increase would result in increased charges of $36 a car or less than 1 percent per hundredweight. These rates are presently at a low level.

Protestant Merichem continues to receive wastes from over 100 refineries in 21 States and Canada. It recently supported the establishment of a rate of 80 cents per hundredweight from Amoco, Va., to Houston, a distance of 1,431 miles. In contrast, the present rate from American Oil's refinery at Sugar Creek, Mo., a representative midwestern movement, is only 48 cents per hundredweight. Since it imports wastes for long distances from Canada, Pennsylvania, or Virginia, there may be other reasons that freight rates for not serving other plants within that radius. For example, the amount of useful chemicals in any particular batch of petroleum wastes depends on the type of crude processed by the refinery, the processes, and the chemicals employed. Thus, the use of wastes of a particular refinery may largely depend on the amount of recoverable products in the waste and the selling price of such recoverable products. It is also apparent that if Merichem pays the freight and utilizes leased tank cars it is to its advantage to obtain petroleum wastes as close to Houston as possible where the freight and tank car turnarond times will be minimized. Moreover, the allegation that the increases will result in a diversion from rail to barge is contradicted by protestant's admitted increase in the use of rail service from 1969 through 1971. Finally, when barges are available some traffic may be diverted regardless of the railroad rate level.

Protestant's contentions that refineries depending on rail movement may again resort to dumping wastes into watersheds is simply erroneous. Refinery operators are cognizant of the need to control pollution and are required by law to do so. Moreover, there are a number of alternatives available to refiners, including direct sale to papermills or to Merichem's competitors, and use of fluid bed incineration, a nonpolluting method of waste disposal. Additionally, in the fluid catalytic cracking process the spent caustic waste solution may be stripped of hydrogen sulfide. Furthermore, petroleum products may be treated so as to remove the

sulphur directly rather than through caustic washing. The sulphur so recovered is in a salable form and there is no creation of caustic petroleum refinery waste. The trend in the industry is toward this type of process.

The adopted increases on these commodities will not in our judgment affect the movement of these commodities for recycling purposes.

Scrap Glass—Recycling and Transportation—Obsolete scrap glass comprises 6 to 8 percent by weight of the Nation's solid waste.[82] Recent estimates, however, indicate that only 4.5 percent of obsolete scrap glass (cullet) is recycled.[83] This rate is low, comparable to the recycling rates for rubber, plastics, and textiles. In view of estimates that 60 percent of the annual glass production is potentially recoverable, we need to consider the various factors impeding progress in increasing the recycling rate.[84]

The major problem in its recovery is that of sorting obsolete scrap glass from solid wastes. As one authoritative source states, "The key economic parameters of cullet acquisition from mixed waste are dependent on the technical process for separation and upgrading of cullet from mixed waste."[85] Experiments currently are underway to develop methods for the mechanical separation of obsolete glass scrap from mixed refuse and the sorting of that glass into its respective colors.[86] Work is also being done to improve glass crushing and cleaning equipment. Since all these efforts are still experimental, however, their economic feasibility has not been established.

The recycling of "home" or "prompt industrial" glass scrap—that resulting from the production of glass end products in the factory—is burdened with fewer problems

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[82] Arsen Darnay and William Franklin, *Economic Study of Salvage Markets for Commodities Entering the Solid Waste Stream* (for Environmental Protection Agency), Midwest Research Institute, December 1970, p. 7-11.

[83] *Loc. cit.*

[84] *Economic and Environmental Analysis of Glass* (draft copy for Council on Environmental Quality), Midwest Research Institute, August 1971, p. 15.

[85] *Ibid.*, p. 7.

[86] Sullivan, P., et al., *Electronic Color Sorting of Glass from Urban Waste*, Bureau of Mines Solid Waste Research Program Technical Progress Report 45, October 1971, pp. 1-8.

than obsolete scrap glass recycling. Most of these fabrication or production wastes (1,350,000 tons in 1967) are reused on an in-plant basis.[87] This scrap is clean, is free of contaminants, and does not require the arduous and expensive sorting associated with obsolete glass scrap recycling. Manufacturers clearly favor internally generated glass scrap because they have no question about its chemical composition and quality.[88]

The glass industry is particularly well suited to the recycling of "home" or "prompt industrial" glass scrap. Most glass plants are fully integrated in that they consume virgin raw materials and produce a finished product. As a result, internally generated cullet can be crushed, mixed with the virgin raw materials, and sent through the entire melting and fabrication process without requiring modifications of equipment or processes. In fact, in glass making, cullet is a technically and economically functional input material.[89] The use of cullet actually aids the melting process, since it liquifies at a lower temperature than raw materials. Thus, the thermal efficiency of the furnace is increased. Less fuel is consumed, and the lower melting temperatures required result in longer furnace life and a reduction in repair and maintenance costs. The shortened melting time results in greater output of the finished product per day at reduced costs.

There appears to be no technological limit to cullet usage in certain glass-making processes. Thus, even if nearly 100 percent of the input were cullet, the end product could be equal in quality to currently produced glass containers.[90]

At present, however, the glass industry's average input of cullet is only 15 percent by weight, and a large portion of that, well over two-thirds, is internally generated. The remainder is composed of cullet purchased by glass manufacturers, and includes both prompt industrial and obsolete varieties. Data are not available which would indicate the relative portions of these three types of cullet which are

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[87] Darnay and Franklin, *op. cit.*, pp. 7-9, 7-13.

[88] *Ibid.*

[89] *Loc. cit.*

[90] Economic and Environmental Analysis of Glass, p. 13.

TABLE

Purchased Cullet Consumption by Sectors of the Glass Industry, 1967
(Aggregates in 1,000 tons)

	Glass Containers	Flat Glass	Pressed and Blown Glass	Total Industry
Total purchased cullet consumed	100	244	256	600
Total raw materials consumed	12,100	2,500	2,060	16,660
Purchased Cullet as a percentage of total raw materials consumption	1	10	12	3.60

Source: Midwest Research Institute.

utilized. As illustrated in the table, in 1967 the glass container industry purchases of obsolete cullet equaled only 1 percent of its input tonnage of raw materials; the flat glass segment purchased 10 percent; and the pressed and blown glass segment purchased 12 percent of its inputs as cullet. When considered along with the percentage of raw materials these sectors of the industry used in 1967 (73, 15, and 12 percent, respectively), it becomes apparent that purchased cullet, including both prompt industrial and obsolete, comprised only 3.60 percent by weight of the raw materials inputs of the glass industry. Taking into account the fact that most purchased cullet is of the prompt industrial type, only 1 to 2 percent of raw materials inputs in the glass industry is obsolete cullet.

Manufacturers of glass containers consume virtually all of their internally generated cullet.[91] Some excess cullet is produced and sold by the flat glass and pressed and blown glass sectors of the industry, but most of it is purchased by other glass plants which need it to supplement internal cullet when their production rates and pack-to-melt ratios do not yield enough internally generated cullet.[92] The only processing necessary before purchased commercial cullet (all purchased cullet, excluding that collected by citizens' groups) is shipped is crushing, a relatively inexpensive and fast process, so costs are kept relatively low. Estimated average delivered prices for commercial cullet in 1971 were

[91] Darnay and Franklin, *op. cit.*, p. 7-9.

[92] *Ibid.*, p. 6-16.

$18.50 per ton of clear glass and $16.50 per ton of amber or green glass.[93]

Obsolete cullet differs from prompt industrial cullet in supply characteristics. Containers comprise at least 75 percent of obsolete glass found in colected waste, and small portions of flat glass and pressed and blown glass make up the remainder; whereas flat glass composes a larger share of commercial cullet.[94] The most important sources of obsolete cullet are found in the Nation's major population centers, but very little obsolete cullet is actually recycled from municipal refuse. Most of the recycled obsolete cullet is in the form of refillable or returnable beverage containers which have outlived their usefulness. The glass industry prefers these containers to nonrefillable or non-returnable containers because of the better quality of the glass from which they are made.[95] A relatively new development in glass recycling is the growth of citizens' groups concerned with environmental quality which have successfully sought the cooperation of the glass industry in recycling a larger portion of nonrefillable containers. In what is generally a volunteer effort, glass containers have been collected, cleaned, sorted, crushed, and transported to the nearest glass factory for a widely accepted price of $20 per ton.[96] At $20 per ton the industry participants are absorbing costs that could not be justified in a narrow economic sense. Prices for processing obsolete cullet other than the "citizen-collected" variety range from $18.50 per ton of clear glass to $16.50 per ton of colored glass, as does the commercial cullet.

As stated previously, it has been estimated that 60 percent of the annual glass production will be recoverable for refabrication when separating and sorting equipment is perfected and put into use on a broad scale.[97] Thus, glass

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[93] *Economic and Environmental Analysis of Glass*, p. 12.

[94] Darnay and Franklin, *op. cit.*, p. 7-19.

[95] *Ibid.*, pp. 7-2, 10, 19.

[96] Letter to ICC from Leonard F. Giaço, Assistant Director of Traffic, Glass Container Manufacturers Institute, dated August 8, 1972.

[97] *Economic and Environmental Analysis of Glass*, pp. 7-19. Estimated capital costs for a 500 ton-per-day raw refuse plant are $200,000 based on the

producers could consume the equivalent of 60 percent of their production as cullet without having to make major processing modifications and with no decrease in quality of the finished product. It has been estimated that capital investment requirements to revamp industrial plants would range from $50,000 to $100,000, depending upon the type and age of the plant.[98] Perhaps a more important point is that the change-over could be accomplished within a framework of normal periodic plant improvements practiced by the industry. In addition, if the industry average recycling rate were increased from 15 to 60 percent, total wastes and effluents from glass production would be reduced more than 50 percent and total energy consumption would decline between 30 and 50 percent.[99]

The materials with which cullet competes in glass making are, primarily, sand, soda ash, and limestone. These account for 94 percent by weight of the raw materials used in glass production.[100] There does not appear to be any shortage for these low-cost virgin materials. The estimated average cost of the raw materials necessary to produce a ton of glass containers in 1970 was $18.43, delivered.[101] As noted above, the cost of a ton of *delivered* clear cullet in 1971 was between $18.50 and $16.50. The materials which compete indirectly with cullet are those which compete directly with finished glass products, particularly with glass containers. The most important of these are plastic, steel, and aluminum.[102] While glass has fallen behind metal cans in its share of the beverage container market, it is difficult to discern any overall trend from the data available as to the glass industry's share of its various markets.

There exists the potential in other areas for future increases in cullet usage. The Bureau of Mines has met with considerable success in its experimental fabrication of

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sortex optical separation technique connected to a Black Clawson processing system.

[98] *Ibid.*, p. 3.

[99] *Ibid.*, p. 20.

[100] *Ibid.*, p. 4.

[101] *Loc. cit.*

[102] *Ibid.*, p. 10.

building bricks using 70 percent crushed glass residue and 30 percent clay.[103] The brick produced by use of a tunnel kiln plant was economically competitive with face brick. Cement blocks utilizing crushed glass as 30 percent of the aggregate have been found to be of superior strength to conventional products. Wall panels fabricated from mixtures of up to 90 percent glass cullet have been found to be exceptionally strong and considerably less expensive than some comparable building materials. Experimental production of spun glass insulation using large percentages of cullet, and terrazzo floors utilizing amber cullet, have produced encouraging results. Substitution of cullet for asphalt aggregates in "glasphalt" paving materials has proven technologically successful (in many ways it is superior to conventional asphalt paving) but economically unfeasible.[104] Finely ground glass is currently being used in reflective highway paints, a use which promises to increase in future, and has been used for some time in the manufacture of abrasives. Flat glass and pressed and blown glass cullet is most frequently ground or powdered and used for match heads and striking abrasives, ammunition, and reflective material.[105] The total tonnage of glass used in all these products remains relatively small, and these uses do not appear to be on the verge of a dramatic increase.

In sum, although various experimental uses of obsolete cullet have been developed, the area of greatest potential for increasing obsolete cullet recovery remains that of refabricating it into new glass products. One of the major reasons for a low demand for obsolete cullet on the part of glass fabricators is the absence of the "steady, trusted, and reliable source of cullet [which] is needed to give continuity to the production process and batch mixtures."[106] This inconsistency or unpredictability of obsolete cullet supplies

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[103] Tyrrell, Miles, et al., *Fabrication and Cost Evaluation of Experimental Building Brick from Waste Glass*, Bureau of Mines Report of Investigations 7605, 1972, pp. 18-33.

[104] *Economic and Environmental Analysis of Glass*, pp. 21-22.

[105] Drobny, N., et al., *Recovery and Utilization of Municipal Solid Waste, Environmental Protection Agency*, 1971, pp. 90-91.

[106] Darnay and Franklin, *op. cit.*, p. 7-15.

may be largely attributed to the lack of technological advances necessary for separating, cleaning, and sorting scrap glass. When such improvements are realized, a steady stream of cullet should be forthcoming from our municipal refuse.[107]

Conceivably, transportation rates and costs may make the difference between cullet being recycled or being left in sanitary landfill. While there is little useful information available on average freight costs or raw materials and cullet costs, efforts have been made recently to estimate such figures. The average raw materials cost per ton of glass produced in 1970 was estimated to be $18.43.[108] Of that total, $5.60, or 30.4 percent, represented freight costs. The estimated average cost of a delivered ton of clear cullet was $18.50,[109] in 1970. If that cullet were shipped via rail 397 miles (the average haul in 1969, the latest year for which data are available), the freight charge is estimated to have been $8.00, or 43.2 percent of its delivered price.[110] The disparity in freight costs relative to delivered prices may have increased since 1970. In Ex Parte No. 265 this Commission granted rate increases of 6 percent on all commodities involved in glass manufacture, including cullet. Rate increases on the same commodities, ranging from 6 percent in the Southern Territory to 14 percent in the Eastern Territory were granted in Ex Parte No. 267. The rate increases under consideration herein, listed in the Table below, do not appear to have the potential to ameliorate these disparities.

Transportation characteristics of cullet appear to explain only a portion of its disproportionately large freight costs. While cullet and its virgin raw materials counterparts move in similar type cars (open and covered hopper cars, gondolas, and a small number of boxcars), the average weight per carload (52.6 tons) of cullet shipped via rail in 1969 was considerably less than the corresponding weighted

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[107] *Economic and Environmental Analysis of Glass*, pp. 7-8.

[108] *Ibid.*, p. 4.

[109] Cullet can be competitive at prices up to 10 percent above virgin raw materials. *Ibid.*, p. 10.

[110] *Ibid.*, p. 12.

Table

Ex Parte No. 281: Proposed Rate increases

Commodity	Proposed Increases	Exceptions
Cullet (STCC 3229924)	6 percent	3 percent - To, from, or within Southern Territory
Industrial Sand (STCC 1441310)	6 percent	5 percent - To, from, or within Southern Territory
Dolomitic Limestone (STCC 1421310)	10 percent - To or within Western Territory, or from Western to Eastern Territory 5 percent - Within Southern Territory, or from Eastern or Western to Southern Territory 3 percent - Within Eastern Territory, or from Southern Territory to Eastern Territory	
Soda Ash (STCC 2812322)	6 percent	5 percent - To, from, or within Southern Territory (maximum $.50 per ton) No increase on movements originating in Wyoming.

average (74.1 tons) for the competing virgin raw materials shipped during the same year.[111] Cullet may be more difficult to handle than its raw materials counterparts; as a result it may be somewhat more expensive to load and unload. It is difficult, however, to determine precisely what portion of the disparity in freight costs may be attributed to these characteristics. Further study of the rail rate structure in this area will be necessary before charges of discrimination can be dealt with in a totally definitive manner.

Some of the most significant data available are those which indicate the portion of purchased cullet (both prompt industrial and obsolete) which moves via rail. In 1967, the latest year for which comparisons are available, approximately 173,231 tons of an estimated total of 600,000 tons of cullet purchased were transported by rail,[112] approximately 29 percent. The disparities in relative freight costs described above means that equal percentage rate increases would result in a greater absolute freight price change (revenue per ton) for cullet than for its equivalent raw materials. The differential increase in freight costs would, in turn, increase the difference between the delivered prices of cullet and its equivalents in cases where cullet is more expensive, and reduce its price advantage in cases where it is not. In the example cited above, cullet was 7 cents more expensive (delivered) than the alternative raw materials. A 6 percent increase in rates would increase the cullet price to $18.98, and would raise the raw materials price to $18.77. The difference of 21 cents, although considerably less than the $1.88 maximum allowable (10 percent), would nevertheless erode cullet's competitive position, which is presently based on an average 7-cent difference. (Six percent if the proposed increase applicable to most of the relevant

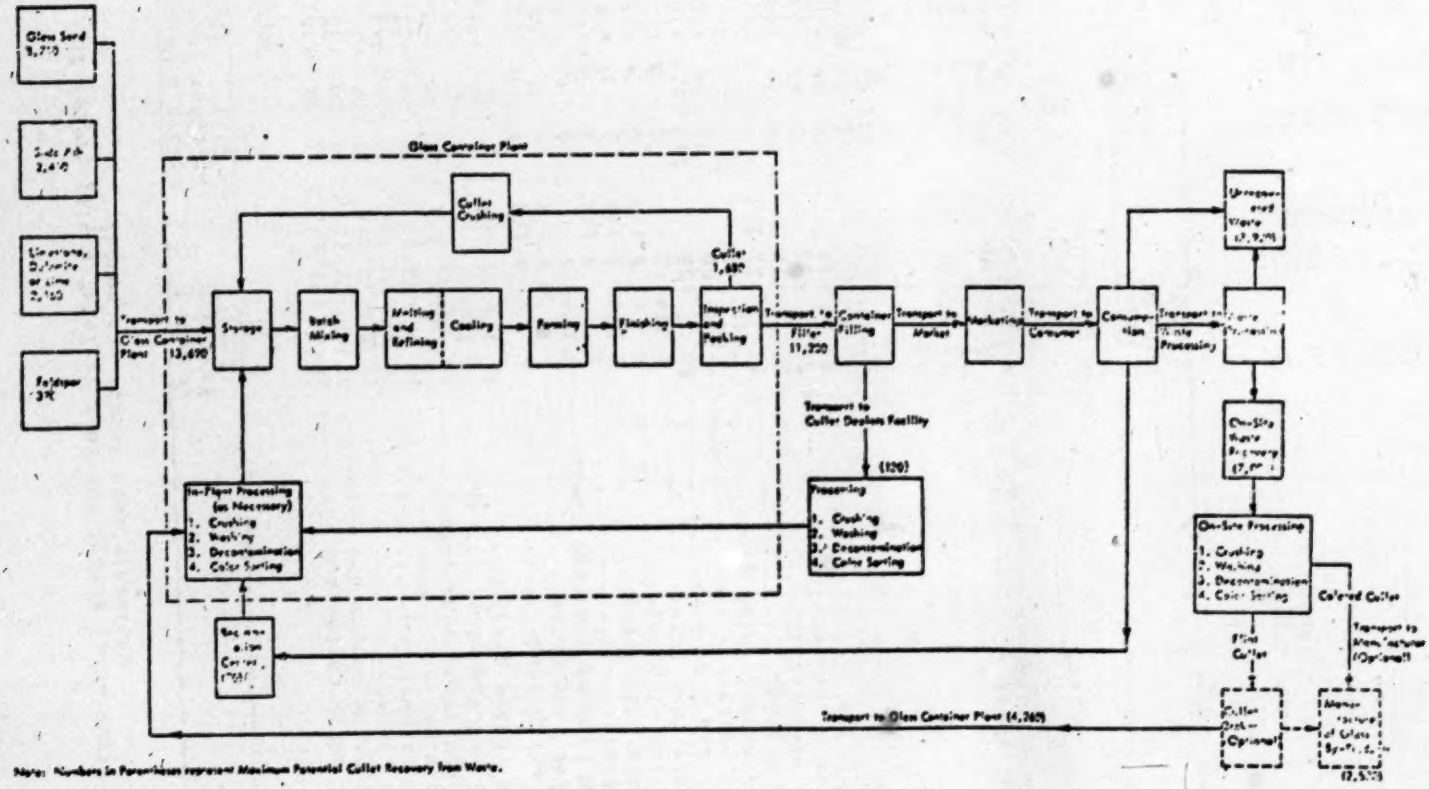
[111] *1969 Carload Waybill Statistics*, Department of Transportation Statement TD-1, April 1972.

[112] ICC Bureau of Economics' estimate. Tonnage carried via rail was estimated by applying the ratio (by weight) of cullet (STCC 3229924) to all glass and glassware, pressed and blown (STCC 322), carried in 1966 (derived from 1966 Carload Waybill Statistics) to the tonnage of all pressed and blown glass and glassware transported by rail in 1967 (from 1967 Freight Commodity Statistics). The calculation follows: .0861 × 2,007,314 tons = 173,231 tons. 173,231 tons is the equivalent of 28.9 percent of the 600,000 tons of cullet purchased in 1967.

movements of these commodities; see the Table above). The actual effect of a rate increase will depend upon how closely industry prices do conform to the estimates cited herein. However, rail rates affect only slightly more than one-fourth of the glass currently recycled. There is no information available at present to indicate what portion of that traffic could be adversely affected by the rate increase proposed but, presumably, some dealers with relatively high costs could find their ability to compete impaired.

In summary, it appears that, regardless of the presence or absence of discrimination, a freight rate increase on cullet, accompanied by an equivalent or slightly greater composition rate increase on its raw materials competitors, may occasion an indeterminable decline in purchased cullet consumption, although only a fraction of the cullet market will be affected. We believe that the holddown approved in our prior report to 3 percent is just and reasonable, and responds to the environmental goal of promoting the recycling of these commodities. It is material to note that not one shipper of scrap glass has objected to the approved 3 percent increase. A chart indicating the flow of raw materials and potential cullet recycling follows.

Nonferrous Metal Scrap.—The nonferrous metal and alloy scrap industry has been granted downward rate adjustments throughout official territory. Incentive rail rates were established in 1963 covering a complete list of nonferrous metal scraps within minimum weights ranging from 40,000 to 80,000 pounds. Effective December 10, 1969, the eastern railroads published a further downward revision in the overall rate levels by establishing 100,000- and 120,000-pound incentive rate scales. These incentive rate scales and the lower rate levels resulted in an average load within official territory of 84,000 pounds on all nonferrous scrap metal, waste, or tailings. The 120,000-pound rate level is relatively the same or below the rate level applicable approximately 9 years ago. In response to protestants' contention that nonferrous metal or alloy scraps are low-value commodities which cannot absorb increases in freight rates, respondents have submitted the following quotations to demonstrate that many scrap metals have increased in price during the past 9 years:



Note: Numbers in Parentheses represent Maximum Potential Cullet Recovery from Waste.

APPROXIMATE VIRGIN RAW MATERIALS FLOW AND POTENTIAL CULLET RECYCLING FLOW FOR GLASS CONTAINER MANUFACTURE, 1,000 TONS, 1970.

Nonferrous metal scraps New York dealers' buying prices in wholesale lots (cents per pound)

	Column 1 February 1963	Column 2 December 1971	Column 3 Increase or decrease
			Percent
No. 1 heavy copper and wire	24 -24 1/2	33 -34	+38.8
No. 2 heavy copper and wire	22 -22 1/2	29 -30	+33.3
Light copper	19 3/4-20 1/4	27 -28	+38.3
No. 1 composition	20 1/4-20 3/4	29 -30	+44.6
Brass pipe	16 -16 1/2	19 -20	+21.2
Auto radiators (unsweated)	15 1/4-15 3/4	21 -22	+39.7
Cocks and faucets	16 1/2-17	20 -21	+23.5
Heavy yellow brass	14 1/4-14 1/2	18 -19	+31.0
Soft scrap lead	6 - 6 1/2	4 - 4½	-30.8
Battery lead plate	2 - 2 1/2	---- - 1	-60.0
Clean hand picked type shells	5 1/2- 6	6 - 6½	+ 8.3
Old zinc	3 - 3 1/4	3 - 3½	------
New die cast scrap	2 3/4- 3 1/4	3 - 3½	+ 7.7
New zinc clipping	5 - 5 1/4	6 - 6½	+23.8
Old die cast scrap	1 3/4- 2	2 - 2¼	+12.5
Block tin pipe	80 -85	110 -115	+35.3
No. 1 pewter	-------60	72 -75	+25.0
No. 1 babbit (high grade)	-------40	--- ----	------
Solder joints	12 -21 1/2	--- ----	------
Pure nickel clips	53 -54	70 -75	+38.9
Rolled nickel anodes	55 -56	75 -85	+51.8
Nickel rod ends	53 -54	74 -85	+57.4
Nickel turnings	40 -41	55 -60	+46.3
New monel rods	25 -26	45 -50	+92.3
New monel clips	25 -26	48 -53	+103.8
Monel cast	20 -21	42 -48	+128.6
2S aluminum clippings	9 3/4-10 1/4	7½- 8	-23.8
Old aluminum sheet	7 - 7 1/2	5½- 6	-20.0
Monel sheet	25 -26	42 -48	+84.6
Brass rod ends	----- -------	25 -26	------

Nonferrous metal scraps Pittsburgh dealers' buying prices in wholesale lots (cents per pound)

	Column 1 February 1963	Column 2 December 1971	Column 3 Increase or decrease
			Percent
No. 1 heavy copper and wire	22 3/4-23	38 -39	+69.6
No. 2 heavy copper and wire	21 -21 1/4	32 -33	+55.3
Light copper	19 -19 1/4	29 -30	+55.8
No. 1 composition	20 1/2-20 3/4	30 -31	+49.4
No. 1 composition turnings	20 -29 1/4	---- ----	------
Auto radiators	15 -15 1/4	23 -24	+57.4
Yellow brass	13 -13 1/4	19 -20	+50.9
New brass clippings	17 3/4-18	24 -25	+38.9
No. 1 brass rod turnings	14 1/2-14 3/4	22 -23	+55.9
Aluminum castings	7 1/2- 8	5½- 6½	-18.7
Aluminum borings and turnings	5 1/4- 5 1/2	4 - 5	-9.1
Old zinc	3 - 3 1/4	4 - 5	+53.8
New zinc clippings	5 1/4- 5 1/2	8 - 8½	+54.5
New die cast scrap	3 1/2- 4	3 - 3½	-12.5
Type metal	7 1/2- 7 3/4	9 -10	+32.1
Soft scrap lead	6 1/2- 6 3/4	7½- 8	+18.5
Battery lead plates	----- - 2	2 - 2¼	+12.5
Monel metal	23 -24	23 -24	+95.8
Cocks and faucets	----- -------	22 -23	--------
New brass clippings	----- -------	24 -25	--------
Mixed aluminum clips	----- -------	8 - 9	--------

Source: Secondary raw materials-Publication of the waste trade industry.

Protestants contend that the existing rate structure discriminates against secondary materials in favor of virgin raw materials and that the degree of discrimination has been compounded in recent years by Commission approval on flat percentage increases. Thus, in 1960, nonferrous scrap metal was charged an average of approximately 13 cents more per hundredweight than the ore of the same metal. The differential today is approximately 18 cents per hundredweight. Freight rates from the South and Southwest to major consuming markets in official territory are now between 1 and 1.5 cents per pound for metal scrap; this represents 2 to 5 percent of the delivered value of copper scrap, 8 to 15 percent of the delivered value of aluminum scrap, and 10 to 20 percent of the delivered value of stainless steel scrap.

Aside from the showing that the railroads have need for additional revenue, the carriers point out that nonferrous metal scrap has considerable value (between $20 and $2300 per ton) and is in short supply, and thus it is collected and recycled to the full extent. In spite of the fact that nonferrous metal scrap can afford the rate increases, the railroads have established incentive loading rates, under which the lowest 1972 rates are nearly the same as the lowest 1963 rates. As to NASMI's claim of diversion to motor carriage, the railroads show that between 1966 and 1969, when there were several general rail rate increases, the rail tonnage of waste and scrap material increased by more than 3.8 million tons, while the corresponding figure for motor carriers remained at about 400,000 tons. The railroads point out that NASMI's claim of rate discrimination against nonferrous scrap is in error, since NASMI compared rates per 100 pounds of scrap and ore, and these commodities have different metallic content and transportation characteristics, reflecting differences in the type of equipment required, average loading, and average distance hauled.

The United States produces 15 million tons of scrap metal a year. A 4 percent increase (and only a 3 percent increase has been approved) on these commodities would result in an increase of only 3 cents per hundredweight in the freight rate, which would increase the rate to 68 cents

per hundredweight or the same rate that was effective in 1963. We do not find that a 3 percent increase, which will keep rates below a 1963 level, will in any manner slow the movements of the commodities for the purpose of recycling and reclamation.

It is worthy of note that aluminum is the only nonferrous metal encountered in municipal waste in significant quantities. About 680,000 tons of aluminum cans, food trays, and packaging foils were part of such waste in 1968.[113] The following flow chart traces the movement of all aluminum scrap. Other nonferrous commodities follow a similar movement. The folowing map shows the geographic location of secondary aluminum smelters. These locations indicate why it is less economical to recycle aluminum scrap from certain areas of the nation than it is from others. Again, we believe that this problem is common to most nonferrous scrap materials.

Plastics—Recycling and Transportation.—Plastic scrap amounted to 3 percent of all mixed refuse collected in 1968, comprising 1.4 million tons of the total of 193.7 million tons collected in that year.[114] Estimates made in a study done for EPA by Battelle indicate that plastics will compose 3 percent of mixed wastes in 1976 for a total of 11 billion pounds of plastic wastes annually.[115] Production of plastic materials reached 9.35 million tons in 1970, up 2 percent from 1969, and 300 percent from 1960. While the absolute amount of plastic scrap is not insubstantial and promises to grow rapidly in the future, both technological and economic consideration have impeded efforts at recycling this material. There is limited re-use of fabrication wastes, trimmings, chips, etc., which may be re-used immediately in the fabricating plant or acquired by plastics scrap processors who regrind, color blend, and remelt scrap. These processors frequently operate on a contract basis, returning wastes to the organization which provided them, reformulated into a re-usable product. The processed scrap is then

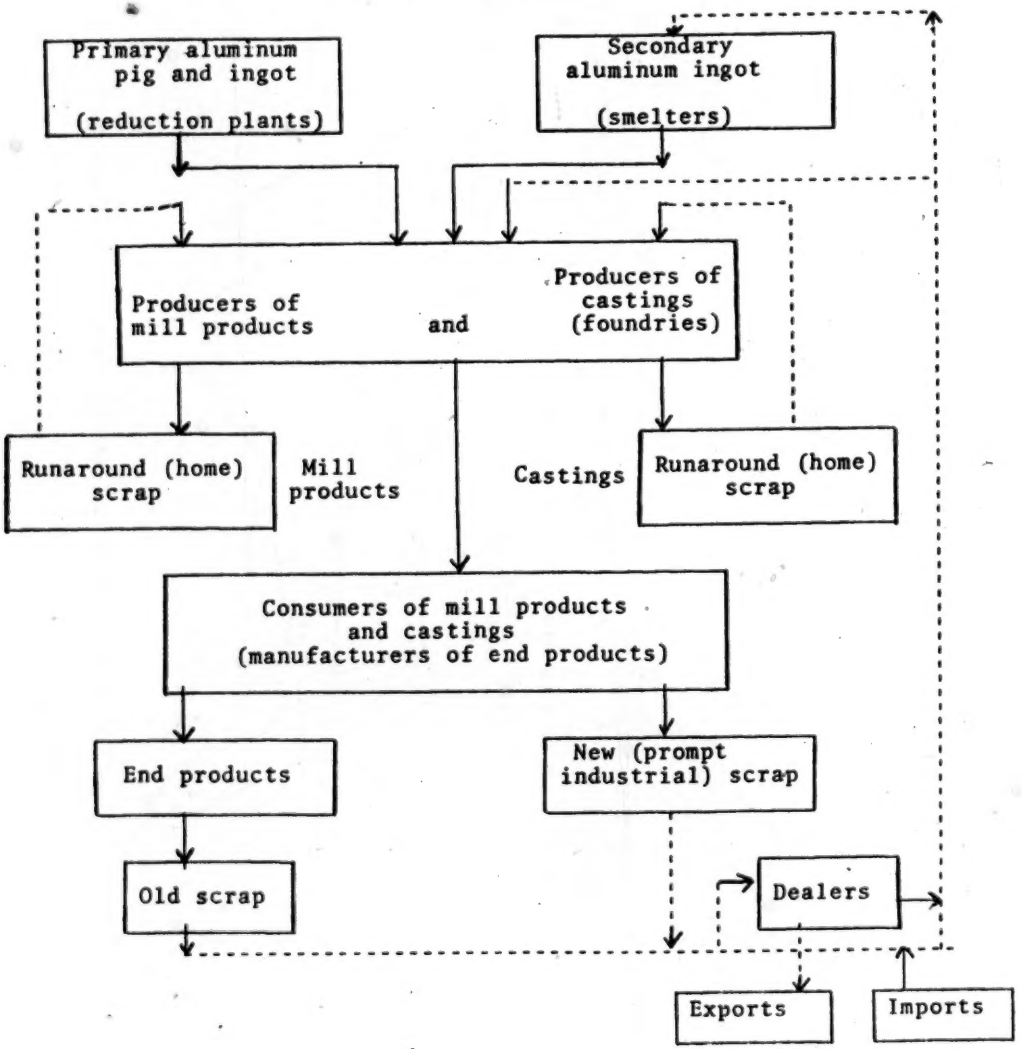
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[113] Darnay and Franklin, *op. cit.*

[114] Arsen Darnay and William Franklin, *op. cit.*, p. 9-10.

[115] Drobny, et al., *Recovery and Utilization of Municipal Solid Waste* (Environmental Protection Agency), 1971, p. 91.

FLOW OF ALUMINUM SCRAP



Geographic Distribution of Secondary Aluminum Smelters in the United States.

used in the manufacture of items not demanding high quality material.[116]

The key to the economic viability of the processing of fabrication wastes, more commonly called "prompt industrial scrap", is the uniformity of quality, type, and cleanliness of the materials, involved. Very little, if any, sorting of materials is required. Hence, labor and capital costs are minimized while the consistency and quality of the reusable product are maximized.[117]

These economies do not extend to the processing of "obsolete" plastic scrap; that which is found in collected wastes or recovered from along roadsides and waterways. One authoritative source states that "Once plastics leave fabrication points, they are not recovered * * * and there is no recovery from obsolete products."[118] There are a few experimental exceptions. Numerous problems are involved in attempting to recover obsolete plastic scrap. The problems of collecting obsolete plastic scrap are similar to those encountered in the glass industry, the dispersion of sources for the scrap, and the inability economically to separate it from other mixed refuse. The latter are the more critical of the problems, and their solution remains the key to solving the former problems: once it is feasible thoroughly to separate plastics from other solid wastes, collection of the scrap from dispersed points should become economically feasible.

A further barrier to the reclamation of obsolete plastic scrap has been the inadequate technology necessary to clean obsolete plastics and sort them into their types (e.g. polyethyle, PVC, polypropylene, polystyrene), colors, and densities. Research is being pursued in this area by the Bureau of Mines Solid Waste Research Program; and, while the results are promising, there appears to be little hope for widespread employment in the near future of the techniques that have been developed.[119]

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[116] Darnay and Franklin, *op. cit.*, p. 9-13.

[117] *Ibid.*, pp. 9-14—16.

[118] *Ibid.*, p. 9-13.

[119] Holman, J., et al., *Processing the Plastics from Urban Refuse* (Bureau of Mines Solid Waste Research Program Technical Progress Report 50, February 1972), p. 20.

Perhaps the greatest stumbling block to the recycling of plastics is the unsatisfactory quality of end products into which they may be transformed. Use of clean waste plastic as a substitute for virgin materials in various refabrication processes (injection molding in particular) has not yielded an acceptable product. Molds injected with obsolete plastic waste fill incompletely and produce products with little, if any, value.[120]

Among the more promising technology becoming available in the field of plastic recovery is that which facilitates the thermochemical recovery of hydrogen chloride gas (HCl) from polyvinyl chloride (PVC), which comprises 20 percent of all plastics produced annually.[121] PVC waste contains approximately 28 percent HCl, 92-93 percent of which may be recovered easily.[122] No thorough analysis of the costs of processing the PVC for thermochemical recovery of HCl is currently available. As a result, it is difficult, if not impossible, to develop a broad economic view of this recovery process. The Bureau of Mines, however, has calculated that per pound of HCl gas potentially produced, the cost of shipping PVC is less than half that of shipping hydrochloric acid.[123] The Bureau found that railroad freight rates for 100-mile and 500-mile hauls were virtually identical for scrap and virgin PVC materials.[124]

Ford Motor Company researchers have recently developed a process of polymer hydrolysis which has enabled them to recycle polyurethane foam, a major cushioning component in new cars.[125] The use of the foam in the construction of automobiles has increased dramatically from 20 million pounds annually in 1966 to 200 million pounds in 1971; it has also become a correspondingly larger problem in the disposal of junk automobiles. Burning the foam is

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[120] *Ibid.*, pp. 15-16.

[121] *Ibid.*, pp. 17-19.

[122] *Ibid.*, p. 17.

[123] *Ibid.*, p. 19.

[124] *Ibid.*, p. 19. (Based on rates from St. Louis to Rolla, Missouri, and St. Louis to the southwestern United States via St. Louis-San Francisco Ry. Co.)

[125] Zimmer, Mary, "What's Happening to Junk Cars?", *Ford Times*, 65 (August 1972).

usually prohibited, and it does not lend itself to land-fill operations. Details of the process and its economic viability have not yet been made public; accordingly, it is impossible to ascertain its economic significance at this point.

Within the near future, the best potential for utilization of obsolete plastic scrap appears to be the recovery of its latent energy by incineration followed by heat recovery. Plastics have the highest BTU value of any material in solid waste and have been successfully consumed by experimental incinerators fueled solely by municipal refuse (mixed solid waste), with power steam generators to produce electric power.[126]

An estimated 2 percent (12,500 tons or 600 carloads) of plastic fabrication wastes were moved by rail in 1970.[127] The remaining 98 percent was either recycled within the plant or transported by motor carriers to and from plastics scrap processors.[128] These data would appear to confirm the views of the plastics recycling industry the railroad freight operations and rates are of minimal importance in the recycling of plastics.

The data support the contention of the Society of the Plastics Industry that plastic scrap is recycled principally in-plant and that scrap processors play a relatively insignificant role in the recycling segment of the industry.[129] The

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[126] Darnay and Franklin, *op. cit.*, p. 9-17.

[127] ICC Bureau of Economics estimate. Tonnage carried by rail was estimated by applying the ratio (by weight) of plastic scrap to all rubber and plastic scrap carried in 1966 (derived from 1966 carload waybill statistics) to the tonnage of all plastic and rubber scrap transported by rail in 1970 (from 1970 freight commodity statistics). The calculation was as follows: $.21 \times 59{,}726$ tons $= 12{,}495$ tons. Total plastic fabrication wastes for 1970 were estimated on the following basis: only the thermoplastic type of plastic may be remelted and recycled. Of the 9.8 million tons of plastics produced in 1970, a minimum of 70 percent was thermoplastics. Thermoplastics fabrication wastes vary from 5 to 15 percent of production. Using the average fabrication waste estimate (10 percent), we found that a minimum of 7 percent (686,000 tons), of all plastics produced in 1970 are recyclable fabrication wastes. Thereby we arrived at our estimate of the percentage of frabrication wastes moved by rail in 1970 (12,495/686,000—1.82 percent).

[128] From interview with James Holman, co-author of *Processing the Plastic from Urban Refuse.*

[129] Letter to ICC from Martin W. Bercovici, attorney for the Society of the Plastics Industry, dated July 28, 1972.

practice of thermal recovery of HCl from PVC is not currently widespread in the industry, but, as we have noted, the freight rates for scrap and virgin PVC are reported to be virtually the same. Thus, no indications of current or future rate discrimination are present.[130] Ford's process for recycling polyurethane foam has not yet been employed on anything other than an experimental scale; specific information on transportation need and costs has not yet been gathered. Finally, the incineration of municipal wastes, including plastics, to power steam generating plants currently require only short-haul motor carrier transportation of refuse, and there is little reason to believe that the transportation needs or modes involved will change within the near future.

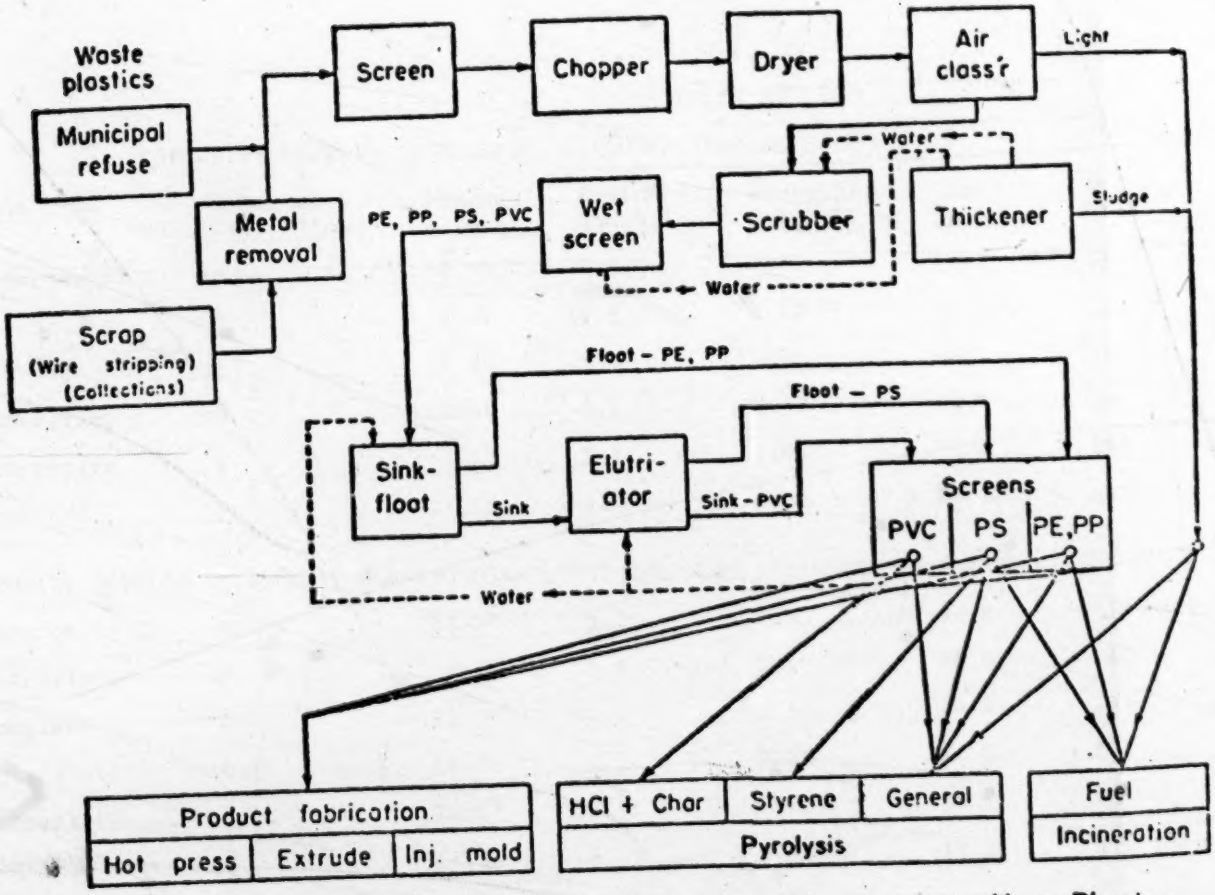
On the basis of the one percent waybill samples for 1966 and 1969 we find that the average revenue per ton mile for plastic cellular expanded or foamed scrap or waste (STCC 4026110) fell from 6.0 cents in 1966 to 3.6 cents in 1969, while the number of sample shipments and their average weight and haul increased. The resulting average revenue per ton for these movements rose from $16.86 in 1966 to $21.50 in 1969. Nonexpanded synthetic plastic scrap (STCC 4026135) was found to have an average charge of $11.60 per ton for the four shipments sampled in 1966, while in 1969 the average revenue for thirteen sampled waybills was $14.08. Because the sample sizes are relatively small, these average rates can only be considered indicative.

As indicated above, plastic scrap produced during the manufacturing process is reused, but this occurs in the plant creating the waste and is not transported in interstate commerce. The industry has not established markets for municipal solid waste or manufacturing waste not used in the same plant.[131] Recycling programs as described above are being developed, but scrap plastic is of uneven reliability and virgin raw materials are expensive. The NIPCC states that except possibly on a limited basis, plastic fractions obtainable from the solid waste stream do not yet appear to be truly subject to recycling at this time.

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[130] Holman, et al., *op. cit.*, p. 19.

[131] Anthony R. Nollet, President, All-American Environmental Control Corporation in a March 1, 1972, speech to the Plastic Waste Management Committee.



Proposed Flow Diagram of Processing System for Reclaiming Waste Plastics.

INT.-BU.OF MINES,PGH.,PA. 1728

COMMODITY 4026110 PLASTIC, CELLULAR, EXPANDED OR FOAMED

Year	Rate Type	Number of Observations	Revenue/ Tons	Revenue/ Ton Mile	Revenue/ Car Mile	Tons/ Cars	Average Haul
1966	Interstate	18	18.79	4.0	0.71	19.5	581
	Intrastate	3	5.27	18.1	6.10	31.0	107
	Combined	21	16.86	6.0	1.48	21.1	513
1969	Interstate	29	22.50	3.6	0.67	22.7	695
	Intrastate	2	7.00	3.7	1.05	30.0	195
	Combined	31	21.50	3.6	0.69	23.2	663
	COMMODITY 4026135	SYNTHETIC PLASTIC SCRAP, NOT CELLULAR, EXPANDED OR FOAMED					
1966	Interstate	3	13.90	3.2	0.77	27.0	517
	Intrastate	1	4.70	35.5	7.10	15.0	10
	Combined	4	11.60	11.3	2.35	24.0	390
1969	Interstate	10	14.53	2.7	0.40	16.0	523
	Intrastate	3	12.57	15.8	2.73	26.7	112
	Combined	13	14.08	5.8	0.94	18.5	428

The plastics industry must attempt to develop practical methods of utilizing plastic found in municipal scrap. The first reported attempt at such a program, using polyethylene milk bottles collected from housewives in the manufacture of drainage tile was halted by Federal regulations requiring that only clean reworked material, generated from the manufacturer's own production may be used. Municipalities may dispose of scrap plastics by fusing them into solids and using this as paving blocks, traffic markers, benches, or parking barriers.

The range of thermoplastic scrap prices in 1969 was from $10 to $110 per ton, depending upon type and form. At the same time, the prices of virgin plastics of the same composition ranged between $225 and $400 per ton. Thus, the incentive to move scrap from many medium to low quality uses could be considered substantial. Obviously, the average charge of 3.6 cents per mile for a ton of expanded plastic scrap, or 5.8 cents per mile per ton for a non-expanded synthetic, would exert differential economic pressure on scrap movements, depending upon whether the particular scrap was a polyethelene selling at from $10-20 per ton, a polytyrene selling at $40-60, or a polyvinylchloride with a price between $90-110. Equally clear is the fact that rate increases must be looked at in the light of these economic facts and the additional fact that less than 2 percent of all recycled scrap is estimated to move by rail.

In conclusion, the recycling of obsolete plastics is currently inhibited largely by technological factors and only marginally by economic parameters. Of those economic parameters, transportation appears to be one of the minor ones. The effects of railroad freight rates in this area of resource recovery are minimal at most.

Fly Ash and Other Industrial Ashes.—Fly ash is a waste byproduct of the burning of coal at electric utility plants. The characteristic that distinguishes fly ash from other forms of coal ashes is its fineness. It consists of smooth, glassy particles, a single particle being so fine that it is invisible to the human eye. Chemically it consists principally of silica, iron oxide, alumina, and lime.

Fly ash production in the United States amounted to 27.1 million tons in 1971, a 2.3 percent increase over the 1970 production. (See the table below entitled Production and

Production and Utilization of Ash in the U.S., 1966-1971

Aggregates in Millions of Tons

Year	Total ash production *	Fly ash production	Fly ash utilized	Percent fly ash utilized of total fly ash production
1966	25.2	17.1	2.0	11.7
1967	27.5	18.4	2.3	12.5
1968	29.6	19.8	2.8	14.1
1969	33.4	21.1	1.9	9.0
1970	31.7	26.5	2.2	8.3
1971	43.0	27.1	3.2	11.8

* Fly ash, boiler slag and bottom ash.

Source: Edison Electric, Fuel and Ash Sub-Committee—Published by National Ash Association

Utilization of Ash in the U. S.). Of the total fly ash generated in 1971, 11.8 percent was utilized, in comparison with a 8.3 percent utilization rate in 1970. From 1965 through 1970, the average annual utilization rate was 11.2 percent. (See the table below entitled Ash Collection and Utilization Survey Year 1969).

Electric utility companies need to dispose of mountains of ash residue that accumulate at coal burning power stations. As with most waste, the alternatives for disposing of this accumulation of ash are becoming more and more restricted. Many utility companies, especially those with plants in urban areas, must have ash hauled great distances, sometimes 70 miles or more, to be dumped. Disposal costs vary from $.20 to as much as $2.50 per ton, with an average disposal cost of $.50 per ton (which is estimated as increasing to $1.00 by 1975).[182] The Potomac Electric Power Company, serving Maryland, Virginia, and the District of Columbia, pays $2.00 per ton for disposal of its ash by truck. In rural areas, where there is more space for dumping, disposal costs, of course, are considerably lower.

[182] Estimate of the National Ash Association.

ASH COLLECTION AND UTILIZATION SURVEY YEAR 1969

	Fly Ash Tons	Bottom Ash Tons	Boiler Slag (If separated from Bottom Ash) Tons
1. TOTAL ASH COLLECTED	21,091,406	7,648,567	2,921,226
2. ASH UTILIZED			
a. Mixed with cement clinker or cement (pozzolan cement)	40,701	-	-
b. Mixed with raw material before forming cement clinker	132,226	5,000	-
c. Partial replacement of cement in:			
1. Concrete products	170,450	5,686	-
2. Structural concrete	176,788	-	-
3. Dams and other mass concrete	161,874	-	-
d. Stabilizer for road bases, parking areas, etc.	148,193	19,417	73,240
e. Lightweight aggregate	263,564	19,288	-
f. Fill material for roads, construction sites, etc.	203,100	1,101,642	548,606
g. Filler in asphalt mix	110,829	10,084	89,970
h. Miscellaneous	235,732	522,883	252,262
TOTAL ITEM #2	1,643,457	1,684,000	964,078
3. Ash removed from plant sites at no cost to utility but not covered in categories listed under "Ash Utilization"	284,036	275,900	500
TOTAL UTILIZED Items #2 & #3	1,927,493	1,959,900	964,578

Source: Edison Electric Institute, Fuel and Ash Sub-Committee.

Ex Parte No. 281

According to industry sources, a major problem in fly ash disposal is educating potential users about its suitability for replacing heavyweight aggregate, the supply of which is declining rapidly in some parts of the country, and the numerous other applications for which ash is a low cost, plentiful, and locally available resource.[133] Despite the potential of fly ash for other purposes, it is now used primarily as an additive. Before it can be marketed, the ash must be tested for its suitability as an admixture. It is important that the ash meet certain chemical and physical requirements. The American Society of Testing Materials, Department of Interior's Bureau of Reclamation, and the U. S. Army Corps of Engineers have developed specifications for the use of fly ash in concrete and other products.

As a recycled material, fly ash currently has the following applications:

1. an additive to cement in concrete and as a raw material or a portion of the kiln feed in the production of cement for dams, masonry block, pipe, and precast units,
2. a mineral filler in bituminous or asphaltic concrete for road surfacing,
3. a raw material in the production of pozzolanic pavement as a stabilizing base for runway and other construction,
4. as a material for the production of lightweight aggregate for processing into lightweight concrete and concrete products,
5. as structural fill for road and other construction (the largest single use), and
6. an abrasive: as oil well grout; a control agent for mine fires and subsidence (sinking) of terrain over abandoned mines; a precipitate in sewage treatment; and a filler or aggregate in asphalt shingles, foundry sand, and chemical products.

Many states permit the use of fly ash in asphalt mixes used for road construction or maintenance. However, present consumption of this material as an additive is rela-

[133] "A Look at the Flyash Picture," a speech by Mr. John Faber, Executive Vice President, National Ash Association, Inc., Washington, D. C.

tively insignificant when compared with its potential. It has been estimated that if fly ash were used as a mineral filler for the eventual resurfacing of all existing bituminous surfaced roads, almost 300 million tons of ash would be required—about 12 times the current U. S. fly ash annual output.

It is anticipated that the use of fly ash in lightweight aggregate production will increase considerably in the future. The process by which the ash is converted to aggregate, called "sintering," can be performed close to the source of the ash, the aggregate can be stored in open piles, and most of the production probably can be consumed locally. Thus, storage and transportation problems will be minimized, keeping the product costs low and enhancing its advantage over rapidly dwindling natural aggregate sources.

Another potentially large use of ash is in the manufacture of bricks, at qualities and prices competitive with clay brick. Researchers at the University of West Virginia have made considerable progress on the use of fly ash and bottom ash in the production of brick. The fly ash brick is composed entirely of the by product of pulverized coal furnaces and passes all American Society of Testing Materials requirements for high quality face brick. Cost studies indicate the product may be manufactured at a cost

Average Price * per Ton, Fly ash and Substitutes—1969

Sand (Construction)	$1.559
Gravel (for Cement)	1.887
Crushed Stone	1.779
Volcanic Ash	1.85 **
Fly ash	1.50 ***

* Prices on commodity as prepared for final use.

** Crude volcanic ash sells at $1.11 per ton. Price range for useable ash in 1968 was from $0.90 to $4.23 depending on form and quality.

*** Utility companies sell flyash at $1.25 per ton. Grading, testing and storage require additional charges.

Sources: U.S. Department of Labor, Wholesale Prices and Price Index (1969); Bureau of Mines, Mineral Facts and Problems (1970) and Minerals Yearbook (1970); and Walter Handy Company (marketers of flyash).

below that of clay brick and marketed at a price to compare with the highest quality clay material. The Nation's need for residential and commercial construction materials can be expected to create a sizeable demand for fly ash brick.

Additionally, aerated concrete ("gas" or "foam" concrete) is an application for fly ash which is growing in Europe and may be utilized here. Research on application of fly ash to agricultural uses has also been undertaken and has shown some potential.

Fly ash is purchased from utility companies by dealers primarily in the busines of marketing ash products. The prevailing price for fly ash is $1.25 per ton. The ash is then tested to determine its value as an additive or for other uses. The cost of testing and storage increases the price of the fly ash to construction firms and other users.

As is shown in the table entitled Average Price per Ton, Fly Ash and Substitutes—1969, fly ash sold at an average price of $1.50 per ton in 1969 while the prices of substitutes were between $1.56 and $1.89 per ton. These average prices represent a considerable range of actual prices which vary with the quality and form of the material. For example, depending upon the chemical analysis and amount of further processing (sintering, etc.), the prices for volcanic ash in 1969 for various uses were as follows:

for use as ballast	$0.90 per ton
for road construction	1.20 per ton
as aggregate	2.04 per ton
as an abrasive	4.23 per ton

Portland cement, which is sometimes mentioned as a competitor to fly ash in pozzolanic applications, sold in 1969 for $18.43 per ton. Industry sources indicate, however, that fly ash is used as an additive to Portland cement and really is not a substitute for it.

The amount of fly ash moving by rail is estimated in the next two tables. Rail movements of fly ash in 1970 are estimated to have totaled 371,969 tons, or 16.9 percent of all fly ash utilized as reported by the National Ash Association. However, this rail movement affected only 1.4 percent of the fly ash produced.

We conclude that the greatest present and potential use for fly ash lies in its application in the construction and

building materials industries. These principally are local in nature, that is, not far removed from the power plants that are the source of the fly ash, and it can be anticipated that such use will burgeon independently of rail transport. Accordingly, we find that the increase in the rates and charges on fly ash which we are approving will not significantly affect its movement and, hence, will not significantly affect the environment. It further appears that fly ash movements have increased although the applicable rates also have risen; and that the railroads require a raise in the applicable fly ash rates in order to maintain and order new covered-hopper cars which are necessary to transport fly ash without polluting the air.

Conclusions as to Environmental Impacts.—

It is not enough to find that rates on competing commodities differ or that increases in such rates will disrupt prior relationships. What has been termed a rate advantage actually may be, as seen earlier in this report, an economic advantage inherent in the transportation characteristics of the commodity in question. Scrap is less dense than virgin material, it requires considerably more handling effort, and it is tendered in much smaller lots than the raw material, and, therefore, the comparable rates would be expected to be higher for scrap. Waste and scrap materials are characterized by various of these transportation handicaps, and

Percentage Shares by Commodity for 1 percent Waybill Sample Group Including Fly ash

Commodity *	Percent of carloads		Percent of tons	
	1966	1969	1966	1969
Fly ash	26.4	28.8	29.5	29.6
Carbon clinker	1.5	0.5	—	—
Carbon silica	—	—	0.7	0.7
Flue dust	12.4	10.5	16.5	14.8
Mill cinder	59.7	60.2	53.2	54.9
	100.0	100.0	100.0	100.0

* "Coke oven products, not elsewhere classified, STCC 33119."

Source: Developed from I.C.C. waybill data for 1966 and 1969.

Estimate of Total Fly ash Shipments by Class I
Line Haul Railroads, 1966-1970

Year	"Coke oven products nec," tons originated	Estimated percentage of fly ash	Estimated rail movement of fly ash		
			Tons	Percent of fly ash utilized C/	Percent of fly ash produced C/
1966	1,130,542	28.8 A/	325,596	16.3	1.9
1967	961,812	28.8 A/	277,002	12.0	1.5
1968	933,892	28.8 A/	268,961	9.6	1.4
1969	1,125,171	29.6 B/	333,051	17.5	1.6
1970	1,256,652	29.6 B/	371,969	16.9	1.4

A/ Developed from 1 percent waybill sample 1966.
B/ Developed from 1 percent waybill sample 1969.
C/ Developed from National Ash Association data.

Source: Developed from Freight Commodity Statistics, Class I Railroads in the United States, 1966-1970.

in varying degrees. Technological innovations such as scrap and paper shredders are helping to make the commodities capable of denser loadings, and improve their value, but the scrap industry cannot now approach the transportation advantages held by mines and mills with their regular shipments in multiple-car and trainload lots. Recent rate increases have not substantially affected the use, consumption, or shipping of secondary materials generally, and the selective rate increases here under consideration are also not likely to do so.

Certain environmental and government groups have advanced the view that we should hold down all increases on materials moving for the purposes of recycling, for environmental reasons. This view is narrow and fails to appreciate any of the other relevant considerations which this Commission must explore in determining the reasonableness and lawfulness of rates. As stated in the 1969 Report of the Citizens Advisory Committee on Environmental Quality—

> For many years environmental considerations have not been given sufficient weight. The pendulum is now swinging to correct this, but zeal can drive it too far. Thus, we shall try to take a balanced, practical approach urging action for the environment in the light of reason.

Such a balanced, practical approach is our aim in this proceeding. We conclude, based on all the considerations set forth in this section of our present report, that the approved rate actions will have no significant impact on the quality of our human environment.

II. Unavoidable Adverse Environmental Effects

In this section of our impact statement, the CEQ guidelines require this Commission to examine any probable adverse environmental effects which cannot be avoided (such as water or air pollution, undesirable land use patterns, damage to life systems, urban congestion, threats to health, or other consequences adverse to the environmental goals set forth in section 101(b) of the NEPA). Based on all available information we do not believe that traffic will be diverted from rail to motor or water carriers as a result

of the increases we have approved. Neither does it appear that any recyclable materials are likely not to be moved as a result of our actions. It is expected that the additional transportation costs will be absorbed by either the creator of the waste or the user-industry.

Even if we thought minor diversion from rail to other modes of carriage might occur, we would still be compelled to approve these rate increases because the railroads require these increases to continue to operate in an economic and efficient manner. Failure to approve these selective increases would endanger the continued existence of the railroads, and accordingly, would have a far greater potential adverse effect upon the quality of our environment than any minor diversion from rail carriage that may occur now. The court in *S.C.R.A.P.* v. *United States,* Civil Action No. 971-72, in its opinion filed January 9, 1973, in discussing the possible expansion of its preliminary injunction to commodities other than recyclables, recognized, in part at least, the practicalities of this situation when it concluded that "many railroads are in dire financial straits—some on the verge of bankruptcy—and badly need the revenues now being obtained under the Commission's rate increase."

Our conclusions herein are based on our sound judgment in transportation and those matters which may affect it. The public should be reminded that this Commission's actions are never completely irreversible. If information should be developed at a later date, adequate procedures exist which would permit us to alter our course of action. Based on our extensive examination in this proceeding, however, we do not believe that the involved freight rate increases will significantly affect the movements of freight. The extent to which such increases may impinge upon those movements will, in our opinion, be limited and indirect and represents an unavoidable, albeit highly speculative, consequence of our duty to regulate the surface transportation industry in the public interest. The ultimate effect on the environment will be even more limited and tenuous, and may be more than offset by other factors and alternatives, which are discussed throughout this report.

III. Alternatives

In responding to the NEPA and CEQ guidelines' admonition that we explore fully the alternatives to the actions

we have approved, we need to consider whether they have enlarged our jurisdiction to pass on railroad rate proposals. We find that they have not, but, rather, are further factors that, along with other expressions of public policy, we are obliged to consider in determining whether the carriers' schedules have been shown to be just and reasonable under the Interstate Commerce Act.

As they relate to our activities, NEPA and the CEQ guidelines require us to take environmental factors into full account in all our planning and decision making. They oblige us to describe in detailed statements the important environmental impact of our major decisions—along with alternatives to such decisions—and to make such assessments public. More particularly, whenever we propose taking a major action with significant environmental impact, we must describe that impact, study and describe alternatives to our action, obtain comments from environmentally expert governmental agencies, and make available to the public, in advance of its effective date, our environmental analysis and the comments of the other agencies. They have not, however, lessened our obligation under the Interstate Commerce Act and, more particularly, its express National Transportation Policy. 49 U.S.C. preceding § 1.

We have examined carefully the provisions of NEPA, as well as its legislative history, and we find in it no Congressional expression that we invalidate railroad rate proposals otherwise shown by the proponents to be just and reasonable under the Interstate Commerce Act. Under the legislative scheme embraced in the Interstate Commerce Act, the initiative for setting their rates resides in the carriers, and we are not to intrude in the exercise of their discretion unless in some particular it offends the terms of that statute. *Interstate Commerce Commission* v. *Louisville & Nashville R.R. Co.*, 227 U.S. 88, 93 (1913); *Mitchell Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U.S. 247, 259 (1913). "The standards it establishes are transportation standards, not criteria of general welfare." *Texas & Pac. Railway Co.* v. *United States*, 289 U.S. 620, 638 (1933).

That the delegation of authority to invalidate railroad rates and charges otherwise shown by the proponents to be just and reasonable under the Interstate Commerce Act is not to be lightly inferred, even in the face of Congres-

sional enactments strongly suggesting such purpose, was settled in *United States* v. *New York Central Railroad Co.*, 263 U.C. 591 (1924), reversing, *Interchange Mileage Ticket Investigation*, 77 I.C.C. 200 (1923), and *Ann Arbor Railroad Co.* v. *United States*, 281 U.S. 658 (1930), reversing, *California Growers' & Shippers' Protective League* v. *Southern Pacific Co.*, 129 I.C.C. 25 (1927). In the former the Supreme Court held that we had incorrectly construed an amendment requiring the railroads to offer interchangeable mileage or scrip coupon tickets, 42 Stat. 827, as indicating an intent that the prices for such tickets be lower than the just and reasonable fares that otherwise obtained. In the latter the Supreme Court held that we incorrectly interpreted the Hoch-Smith Resolution, 43 Stat. 801, as requiring the reduction of the rates and charges on the considered agricultural products below levels previously found to have been shown by the railroads to be just and reasonable under the Interstate Commerce Act. At 281 U.S. 668-669, the Supreme Court, Mr. Justice Van Devanter, said:

> We are of opinion that the Commission's construction cannot be supported. The paragraph does not purport to make any change in the existing law, but on the contrary requires that the law be given effect. Nor does it purport to make unlawful any rate which under the existing law is a lawful rate, but on the contrary leaves the validity of the rate to be tested by that law.
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> * * *
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> [The words of the resolution] fall much short of supporting the construction adopted by the Commission. They are more in the nature of a hopeful characterization of an object deemed desirable if, and in so far as, it may be attainable, than of a rule intended to control rate making. See *United States* v. *New York Central R. R. Co.*, 263 U.S. 603. Of course they should not lightly be disregarded. Neither should they lightly be accepted as overturning positive and unambiguous provisions constituting part of a system of laws reflecting a settled legislative policy, such as the Interstate Commerce.***

More recently, during World War II, we were urged by

the Administrator of the Office of Price Administration that the Emergency Price Control Act of 1942 and other Congressional enactments designed to stabilize prices superseded, at least inferentially, the provisions of the Interstate Commerce Act and imposed upon us an obligation to disallow railroad rate increase proposals otherwise shown to be just and reasonable. In *Increased Railway Rates, Fares, and Charges, 1942*, 255 I.C.C. 357, 392-393 (1943), we said:

> We do not agree with this view. At a time when war has imposed unprecedented burdens on the railroads, and has brought them unprecedented earnings, our duty is to determine a rate structure that will meet the requirements of the national transportation policy and the other governing provisions of the Interstate Commerce Act. We recognize the congressional objectives in the Price Control and Stabilization Acts to prevent inflation during the present emergency, and in the administration of those statutes the Director of Economic Stabilization and the Price Administrator will have our cooperation. We are also cognizant of the vital importance of the national transport system in this crisis. Revenue from operations must be sufficient so that mere lack of money may not be the cause of impairment of the transportation system.
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> * * *
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> The Interstate Commerce and the Price Control and Stabilization Acts declare important congressional policies which are not contradictory, but are complementary. In the administration of the Interstate Commerce Act, we give consideration, when applying the standards of lawfulness of charges made under that act, to the fact that for a National at war a major problem is to prevent undue inflation of prices. We gave consideration to the relation between the Interstate Commerce and the Price Control and Stabilization Acts in *Increases in Texas Rates, Fares, and Charges, supra* [253 I.C.C. 723 (1942)], and we reaffirm the conclusion there reached.

Notwithstanding our disagreement with the Price Adminis-

trator as to the relationships of the statutes in question, we acceded to his request on the merits and ordered the removal of surcharges averaging 4.7 percent that we previously had allowed the railroads to collect on movements of freight. We found "that under present conditions, and, so far as we can reasonably foresee, for the remainder of 1943, the revenues received by the railroads, of their freight rates and charges be reduced by the amounts resulting from our previous authorization of increases in this proceeding will meet the objectives of the national transportation policy as defined in the Interstate Commerce Act, and the standards of section 15a(2) thereof." *Id.*, 255 I.C.C. at 394.

As then, we have no doubt that we must consider the merits of the railroads' proposal selectively to increase their rates and charges solely under the provisions of the Interstate Commerce Act. But, as then we recognized the Congressional objectives manifested in the stabilization statutes to prevent inflation during World War II, so we now recognize the Congressional purpose expressed in NEPA to minimize the pollution of the environment and the exploitation of the resources. Our task is to accommodate the policies of NEPA with the principles expressed in the National Transportation Policy, to give effect to the latter without failing to heed the former. The meshing called for is not unlike what is expected of us in reconciling the policies of the antitrust laws with the provisions of the Interstate Commerce Act, particularly those authorizing us to approve mergers or consolidations of carriers. In *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 79-80 (1944), the Supreme Court observed:

> *** The Commission's task is to enforce the Interstate Commerce Act and other legislation which deals specifically with transportation facilities and problems. That legislation constitutes the immediate frame of reference within which the Commission operates; and the policies expressed in it must be the basic determinants of its action.
>
> But in executing those policies the Commission may be faced with overlapping and at times inconsistent policies embodied in other legislation enacted at differ-

ent times and with problems in view. When this is true, it cannot, without more, ignore the latter. The precise adjustments which it must make, however, will vary from instance to instance depending on the extent to which Congress indicates a desire to have those policies leavened or implemented in the enforcement of the various specific provisions of the legislation with which the Commission is primarily and directly concerned. Cf. *National Broadcasting Co.* v. *United States*, 319 U.S. 190; *New York Central Securities Corp.* v. *United States*, 287 U.S. 12.

See, also, *Northern Lines Merger Cases*, 396 U.S. 491 (1970); *Penn Central Merger Cases*, 389 U.S. 486 (1968); *Seaboard Air Line R. Co.* v. *United States*, 382 U.S. 154 (1965); *Minneapolis & St. L. Ry. Co.* v. *United States*, 361 U.S. 173 (1959).

As the Chief Justice said in *Aberdeen R. Co.* v. *SCRAP*, *supra*, —— U. S. at ——:

> The world must go on and new environmental legislation must be carefully meshed with more traditional patterns of federal regulation.

The Interstate Commerce Act and its provisions relating to railroad rates increasingly have been criticized for their alleged insensitivity to escalating costs incurred by the carriers, on the one hand, and, on the other hand, the intensifying competition they encounter from other modes; the demand for legislative change at no time recently has been greater. Typical of the critics and the relief they seek has been the Council of Economic Advisers, which in its 1972 report put the matter, as follows:

> One of the most significant and negative outcomes of regulation has been the fixing of transportation rates in relation to the value of service to shippers, rather than in relation to the costs of providing service. In the early years such value-of-service pricing was a form of price discrimination intended to benefit railroads which operated under conditions approximating monopoly. As competition from other transport modes grew, rail rates substantially above trans-

portation costs for high-valued goods presented attractive competitive targets for motor and water carriers even though the railroads might have been the low-cost carrier of such freight. The process continues today, and as a consequence, the railroads are increasingly the carrier of low-value bulk commodities despite their comparative advantage as a long-haul carrier for general cargo. Through regulations, value-of-service pricing has been imposed on shippers, requiring them to pay rates for services in excess of the costs of those services. This leads to the provision of less transportation services than is desirable for society. In addition, transport pricing unrelated to the costs of providing efficient service causes mislocation of facilities for commerce and industry, which must adjust to existing transportation rate patterns.

This is neither the time nor the occasion to express any disagreement we might have with the stated view of the regulatory framework or the proposals that have been advanced for its amendment. However, it does bear noting that the suggestion that the rates and charges on recyclable commodities be maintained at depressed levels, with the attendant additional burden that this necessarily would cast on the railroad rates on other commodities, is wholly at odds with the achieving of a cost-related pricing structure. As an abstract proposition it may be no less costly for the railroads to handle recyclable materials than it is for them to transport other freight, and, indeed, elsewhere in this report we noted that the opposite in fact may be the case. In the circumstances for us to attempt to hold the rates and charges on recyclable commodities at depressed levels, upon some theory that it is socially desirable that their movement be encouraged, would cast a burden on the rates and charges applicable on the remaining commodities that the railroads transport or, as some of the parties suggest, the primary materials. In effect the shippers of such commodities would be asked to underwrite or partially subsidize the transportation of the recyclable commodities. We are not at all convinced that we should impose such a pricing scheme upon the railroads and the shippers they serve,

even if, as seems very unlikely, we had the authority to do so.

It seems to us no scientific sin at this point in time to be unable altogether to designate and fully evaluate the potential environmental impacts of policy decisions. In fact, although the current conventional wisdom advocates careful husbanding of natural resources, we are not in possession of any scientific material which specifically enumerates the costs and benefits of recycling versus exploitation of virgin materials. The basic assumptions behind the National Environmental Policy Act of 1969 have not been quantified, and debates rage on the assorted issues of how fixed any resource actually is, the potential impact of technological revolutions, the revirginization of plant resources, and so forth.

We do know that recycling may be more expensive in terms of direct economic costs than use of raw materials, and possible transportation disadvantages are only one item to be considered. Other direct costs involve the preliminary gathering of dispersed waste, its separation by quality or content, the costs of removing and disposing of impurities, and the loss of tax and depletion allowances available for raw material use. In addition to the direct costs, the total social costs of raw versus recycled material use would also include an accounting of the implicit costs of the pollution and depletion involved in each alternative and their capital costs. By assessing the benefits and costs of opposing technologies, a schedule could be drawn up from which policy decisions could be made and beneficiaries identified. Ideally, a rational allocation system would then provide a mechanism whereby the burden of the chosen plan would be equitably shared.

In contrast to such a rational scheme, we are being asked by the protestants to utilize the freight rate structure as a mechanism to allocate the costs of a recycling program when neither the costs nor the benefits have been established by them. We are asked to accept, as an article of faith, assertions which have not been rigorously documented, and furthermore to place a very concrete burden upon the railroads and/or other traffic in the form of revenues foregone and/or additional rate increases. Admittedly,

the increase would generate only a few million dollars in additional freight revenue, but the record has not developed a firm economic case for shifting this burden elsewhere.

However, it would be in keeping with our previously articulated environmental policy to urge that the railroads make a serious effort to design incentive rates which can facilitate the movement of recyclable commodities. Rates to encourage multiple carload movements now exist for non-ferrous metal scrap. Expanding such rates to include all other scrap materials, and adding rate scales respecting density would encourage timed movements of well processed scrap and increase its attractiveness as a material source. This alternative should be pursued by the railroads, and we admonish them to do so.

It has been suggested that we impose holdowns on the rates of all secondary materials. In our judgment, such action has not been shown to be warranted solely on environmental grounds, even though certain holddowns have been adopted in this proceeding on the basis of all factors, environmental as well as others. The holddown on scrap iron granted in Ex Parte Nos. 265 and 267 cost the Penn Central alone about $1 million a year. As we have noted, among the factors causing shippers to shift from rail to motor transportation are service deficiencies. To deny the railroads the increases approved in our prior report would further reduce the quality of service by the railroads and further tend to divert traffic to motor carriage. A rate increase, on the other hand, will provide the railroads with the revenue needed to provide better service. As the court stated in its January 9, 1973 decision in the *S.C.R.A.P.* case, *supra.*, "the railroads draw our attention to the obvious fact that it is in their self interest to request and implement rate increases only where there is no reasonable prospect of diversion to other means of transport. The railroads have as much interest in minimizing diversion as does plaintiff." To meet the railroads' revenue needs by limiting the increases to the rates on nonrecyclable commodities, would tend to raise such rates to the level where they would no longer be just, reasonable, or lawful. This Commission is under a statutory duty to preserve an adequate and economic surface transportation system for the

Nation based on a system of just and reasonable rates, and the environmental considerations do not by themself justify special rate treatment for the affected group of commodities.

Other alternatives suggested by the parties include: (1) directing the railroads to improve their economics of operation, (2) reducing railroad maintenance costs, (3) purchasing more efficient railroad equipment, (4) increasing railroad traffic growth, (5) subsidizing the carriers, and (6) modifying the National Freight Rate Structure. The railroads should be—and so far as this record shows, are—constantly seeking to improve their economics of operation, reduce their maintenance costs, and purchase more efficient equipment. In order for rail carriers to continue to operate economically and efficiently, they must be permitted to increase rates to cover their increased costs. The inflationary spiral presently affecting businesses throughout this Nation also affects the rail industry. Not allowing rail carriers to reflect the rising costs in their rates could not, in our considered opinion, be offset by improved economics of operation by the rail carriers. To prevent the rail carriers from offsetting their rising costs can lead only to a deterioration of available rail services resulting from deferred car maintenance and new equipment acquisitions. Any deterioration in rail service will lead, it seems clear, to the increased use of motor carrier services and a possible (though not definite) increase in air pollution and highway congestion. In addition, the inability of rail carriers to operate economically may compel the cessation of much, if not all, of their operations; and many commodities which today move by rail, and which may not be efficiently and economically transported by motor carrier, may not be able to move at all.

This Commission cannot grant a subsidy to carriers, for that is a Congressional prerogative. As noted above, however, we are required to consider even those alternatives that lie beyond our statutory jurisdiction. It should be made clear, in this connection, that any proposal that the Congress subsidize rail carriers, so that they may transport recyclable materials less expensively, would not enure to the benefit of rail carriers, but rather would in reality bene-

fit the shipper that creates the "waste" in the first instance. The creator of the pollution would be able to move its "waste" less expensively, and every citizen then would be subsidizing these polluters and permitting them to continue creating "waste."

We could not possibly withhold needed rate relief from the railroads on the speculative chance that the Congress will enact such legislation.

Congress may wish to approve a governmental subsidy of recycling transportation, another alternative (which this Commission cannot enact but which deserves mention) or enact a tax allowance for recycling facilities and the use of recyclable materials (perhaps coupled with a depletion tax on raw materials), or the repeal of the depletion allowance for exploitation of natural resources which have recyclable substitutes. These fiscal approaches would encourage recycling at public expense, on the assumption that the benefits are equally public, and remove a present encouragement to deplete virgin materials. The funding of Federal subsidies to promote recycling could come in part from a tax imposed on the production of goods for which eventual disposal will be required. The nature of the product market will determine whether the burden falls upon the producer or the consumer of the goods, but at least a part of the potential social burden of the product as an environmental nuisance will be acknowledged in the production process as a direct cost.

As to the last of the suggested alternatives above, we admit that there are imperfections in the National Freight Rate Structure. This Commission is constantly evaluating this rate structure with an eye towards making it more just and reasonable than it presently appears to be. We believe, and the evidence available to this Commission fails to contradict this belief, that the existing rate structure allows rail carriers to operate with reasonable economy and efficiency and, therefore, to continue to provide those services essential to the transportation of secondary and other materials and necessary to limit the number of trucks on our Nation's highways. The present rate structure considers the position of recyclable materials in the marketplace and does not, in our opinion, unduly hamper the free flow of such materials.

Long before the matter was raised by the environmental groups, this Commission became concerned about the railroad freight rate structure and more specifically about: (a) the possibly self-defeating nature of general rate increases with respect to generating revenues; (b) disparities and distortions in the basic rate structure; (c) the uneven effects of general increases on individual railroads; and (d) the lack of railroad incentive to improve service in line with shipper requirements. See the preliminary report in Ex Parte No. 270, *Investigation of Railroad Freight Rate Structure*, 240 I.C.C. 868, served November 11, 1971. Our order instituting the investigation in Ex Parte No. 270 was dated December 11, 1970, and it invited all persons having an interest in the subject matter to submit their views or arguments. That order was subsequently served on Federal and all known State and local consumer officials and organizations to encourage broader public participation. As we have said in the preliminary report in Ex Parte No. 270 (340 I.C.C. at 880 and 881):

> The economic health and marketing structure of thousands of industries, large and small, rest to varying degrees upon the stability of the transportation rate structure. Drastic changes in that structure should be made only after thorough consideration and evaluation of all the consequences. We, of course, do not regard this system to be above improvement. But, we will want to be reasonably certain that any changes in rate policy resulting from this proceeding, either in administration of the act or in the regulatory laws themselves, will yield substantial public benefits.

To expedite the investigation in Ex Parte No. 270 without compromising the rights of any party, we have adpoted modified rules to permit easier presentation of views. Finally, we recognized that prompt completion of the investigation in Ex Parte No. 270 and in its companion proceeding, Ex Parte No. 271, *Net Investment Rail Rate Base of Return*, 340 I.C.C. 829 (1971), calls for a level of research activity far beyond the resources now available within the Commission. Accordingly, we have obtained the necessary funds and have selected a contractor to augment our re-

search resources. The Statement of Work given the contractor shows:

1. Specification of the Rail Rate Structure and Identification of Changes 1966-present.
2. Determinates of Railroad Pricing.
3. The Economic Impact of Rail Rate Increases. Among other considerations under this heading, the Commission indicated that it is "concerned in the way in which rail rate and service decisions impact on Federal Government programs, such as those dealing with *environmental protection*, urban development, rural economic development, etc." (*Emphasis added.*)
4. Determination of the Relationship Between Rail Rate and Cost Structures.
5. Examination of Alternative Rate Structures.
6. Examination of the Role of Rate of Return.
7. Railroad Investment Levels and Patterns.
8. Relationship Between Rate Structure and Rate of Return.

From the above, it is clear that the issue of the possible environmental impact of the rail freight rate setting process will again be treated in Ex Parte No. 270. Accordingly, all parties interested in pursuing this issue further are invited to participate in that proceeding.

General revenue proceedings, such as the instant one, are concerned with increases in the general rate level and do not pass on the validity of individual rates or groups of rates. If individual rates or groups of rates are believed to be unjust and unreasonable, a shipper or other interested person has an administrative remedy available in sections 13 and 15 of the Interstate Commerce Act, 49 U.S.C. 13 and 15. General revenue proceedings are inappropriate forums for litigating such issues. *Electronic Industries Assn.* v. *United States,* 310 F. Supp. 1286, 1289 (D. D.C. 1970), aff'd mem., 401 U.S. 967 (1971); *Alabama Power Co.* v. *United States,* 316 F. Supp. 337, 338 (D. D.C. 1969), aff'd by a divided court, 400 U.S. 73 (1970); *Algoma Coke & Coal Co.* v. *United States,* 11 F. Supp. 487 (E.D. Va. 1935).

The controversy concerning the proposed rate increases' effect on the recycling of waste and scrap materials is

founded on assertions of rate disparities which mitigate against the movement of wastes in favor of virgin materials. Rates per hundredweight are compared, but with no parallel accounting of the costs attendant upon the comparative movements, and the absolute difference is held to be a "rate advantage." The iron and steel scrap industry has gone so far as to make rate comparisons on the basis of assay value claiming that rates should reflect the iron content of the commodity being carried—a "value of service" scheme carried to the extreme.

As we stated in a previous section of this impact statement, however, it is not enough to find that rates on different competing commodities themselves differ. What has been thought to be a "rate" advantage may be in reality an economic advantage inherent in the transportation characteristics of the commodity in question. If scrap is less dense than virgin material, if it requires considerably more handling effort, and if it is tendered in much smaller lots than the raw material, then the comparable rates may well be expected to be higher for scrap. Waste and scrap materials share all these transportation handicaps in varying degrees. While technological scrap-processing innovations help make the commodities capable of denser loadings and improve their value, the scrap industry cannot today participate in the transportation advantages held by mines and mills with their regular shipments in multiple car and trainload lots.

It would nevertheless be in keeping with our previously articulated environmental policy to urge that the railroads make a serious effort to design incentive rates which can facilitate the movement of recyclable commodities. Rates to encourage multiple carload movements now exist for non-ferrous metal scrap. Expanding such rates to include all other scrap materials, and adding rate scales respecting density would encourage timed movements of well-processed scrap and increase its attractiveness as a material source. This alternative should be pursued by the railroads.

Another alternative considered is the deregulation by this Commission of rates for recyclable materials. S.C.R.A.P. mistakenly contends that this Commission has

taken similar action in respect to another socially desirable and price-volatile class of commodities, vegetable produce. It was Congress, not we, which declared that the trial transportation of agricultural produce should not be subject to economic regulation under Part II of the Interstate Commerce Act. However, this applies only to movements by motor vehicle and not to movements by rail. This decision rests in the sound judgment of the Congress.

Federal procurement regulations have increased the use of recycled paper. Such regulations do not apply to other recyclable commodities. We believe that an increased demand for products manufactured from recyclable commodities by government will result in increased utilization of recyclable commodities. This Commission therefore suggests the General Services Administration (GSA), a party to this proceeding, explore the adoption of appropriate regulations which would tend to create the needed demand for such secondary materials. We also urge those other Federal and State agencies participating herein to explore similar procedures.

Darnay, supra., suggests that the legislature should even the economic disparity between primary and secondary commodities because of the socio-economic benefits of recycling. While Darnay admits that such legislation would result in higher consumer costs, DOT has offered practical suggestions in furtherance of this view. The Federal Government can offer incentive payments for scrap automobiles, part of which would be paid to the automobile owner; Federal or State authorities could license junkyards; and State and local authorities could provide local disposal sites to prevent motor vehicle abandonment. We believe that these suggestions are practical and can be fulfilled with a minimum of effort and opposition. We urge the appropriate governmental bodies to take necessary steps to make these ideas a reality.

The League of Women Voters of the United States in a study entitled *Recycle—in Search for New Policies for Resource Recovery* (1972), pp. 25-30, notes that "There is no shortage of proposals about ways to encourage recycling." It suggests that, "New taxes on virgin materials might reduce the price advantage they now enjoy." Such taxes

might include so-called deterrent taxes, imposed to limit the use of materials by artificially raising its price, and disposal taxes, levied on a product to cover the cost of most efficient disposal under present disposal techniques. As an alternative it proposes that "prices of primary materials could be forced up by reducing or eliminating the capital gains treatment for timber and depletion allowance for minerals." It adds, "Another way is to provide direct subsidies, including price supports, to secondary materials." It recommends the adoption of governmental regulations "to specify recycled materials, whenever applicable, in government purchases." Of course, we are encouraged to remove the disparity in rates between primary and secondary materials and to set minimum standards for the services that regulated carriers must provide; but the study notes that even in the area of eliminating shipping costs differentials, the responsibility is not ours alone.

> Congress could exercise its powers to ease the transportation inequities faced by shippers of secondary materials. To alleviate the shortage of gondolas Congress could enact legislation to provide some type of financial assistance (loan guarantees, for example) to the railroads for purchase of general purpose railroad cars. Or by congressional resolution the Congress could state it to be its will that the ICC—through rate-making, service standards, and use of such financial assistance as Congress provided—should facilitate transportation of secondary materials.
>
> The Department of Transportation might be persuaded to take an active interest in the problems of transporting recycled materials. DOT could fund research, enter rate-making cases, and help to establish service criteria.

The problems of waste disposal are pressing and pervasive. The recycling of discarded materials offers the promise of a partial solution. However, effecting such recycling requires the efforts and perhaps the sacrifices of many quarters and not, as has been suggested throughout this proceeding, those of the railroads alone. We have examined the rate structure maintained by the railroads, and we do not find the bias that prefers primary commodities

to the prejudice of secondary materials that is said to exist. We have examined the methodology and the marketing practices employed in the recycling of waste materials, and we do not find that the railroad rate structure is a significant factor impeding the greater utilization of industrial or municipal trash. We have examined the increases which we have approved, held to a maximum of no more than 3 percent, and we find that such increases will not significantly affect the quality of the human environment. We have considered the alternatives to our actions, both those that are within our power to accomplish and those that are for the Congress or others to achieve, and we find no warrant for deferring our actions in favor of any of these.

IV. Relationship Between Local Short-term Use of Man's Environment and Enhancement of Long-term Productivity

The available evidence demonstrates that the proposed action will beneficially affect the long-term aims of this nation in relation to both production and ecology. By allowing rail carriers to adjust their rates to cover increased costs, we are guaranteeing the existence of rail service to future generations. An efficient rail system—one that will be able to endure financial fluctuations and transport all commodities it presently moves in the future—is thereby promoted and retained. This assures future generations of a possible means of keeping highways less congested and a means of controlling aid pollution associated therewith. We do not believe that there will be any adverse short-term effect upon the quality of the environment by the action proposed herein because it has not been shown, nor does it reasonably appear, that the movements of secondary commodities will be deterred or that any traffic will be diverted from the rails.

V. Irreversible and Irretrievable Commitments of Resources

There will be no curtailment of the range of beneficial uses of the environment. Our present action will not advance the competitive position of primary resources as

opposed to secondary materials and will not add to the pollution of our air. Rather, it will continue the availability of rail services so necessary in our nation's fight to improve the quality of the environment and of human life in general.

Conclusions

In conclusion, we do not believe that the action we take in this proceeding will have a significant adverse impact upon the quality of our human environment. Had we found, however, that our action herein would have some adverse effects upon the environment, it would not preclude our granting the relief sought by the respondents to the extent permitted in this decision. As Senator Jackson has stated: "[subsection 102(c) of NEPA] establishes a procedure designed to insure that in instances where a proposed major Federal action would have a significant impact on the environment, that impact has in fact been considered, that any adverse effects which cannot be avoided are justified by some other *stated* consideration of national policy * * *." 115 Cong. Rec. 29055, October 8, 1969 (emphasis added), in this statement. Certainly environmental issues have been identified and have been considered. If there were any significant adverse effects to be found which we do not believe exist, they are amply justified by the performance of our duties in the public interest in furtherance of the National Transportation Policy to assure the nation of an economical and efficient transportation system. This is supported by the decision in the *Calvert Cliffs* case, *supra*, which stated that in "some instances environmental costs may outweigh economic and technical benefits and in other instances they may not." We believe that any environmental costs which may be expended as a result of our action in this proceeding are outweighed by the economic benefits derived by the railroads, and the resultant quality of rail service such benefits ensure.

The conclusions and findings of this Commission as set forth on pages 528-530 of our prior report in this proceeding, which report is hereby referred to and made a part hereof, are proper and correct in all material respects and

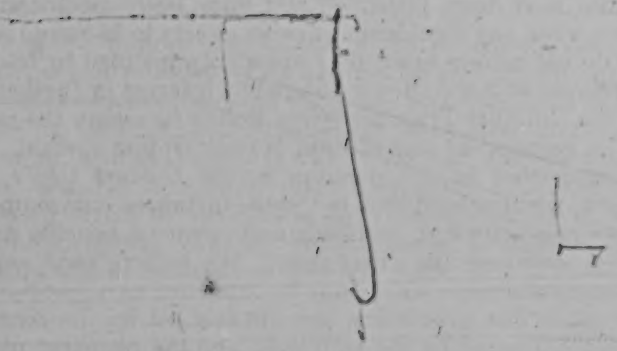
such findings do not require any modification based upon our investigation and conclusions in this report.

Interested persons are requested to submit their views concerning this statement within 30 days of the date of service of this report.

This statement is intended to be a draft environmental impact statement in conformity with the CEQ Guidelines. Therefore, this statement shall not become final until interested persons have been given an opportunity to comment on this statement and submit additional views or data as set forth above.

An appropriate order will be entered.

Commissioners Tuggle, Gresham and Montejano did not participate.



APPENDIX A

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A

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APPENDIX B

Prior Proceedings in Point

Protestants' claim that the rail freight rate structure discriminates against scrap iron and steel and favors competing raw materials is not new. Similar claims have been considered by this agency in the past in both general revenue proceedings and in specific attacks on scrap iron rates as well as other waste products. As long ago at 1922, we found that "[t]he utilization of waste materials is of eco-

nomic value to the country.* * *". *Reduced Rates, 1922,* 68 I.C.C. 676, 720 (1922). Repeating that finding in *Waste Materials Dealers Ass'n.* v. *Chicago, R. I. & P. Ry. Co.,* 164 I.C.C. 587, 599 (1930), we additionally found that:

> * * * the rate level necessary to move a commodity is an element to be weighed in determining a reasonable rate thereon. *Penick & Ford* v. *Director General,* 80 I.C.C. 152. It is clear from the more comprehensive record now before us that a large part of the scrap accumulating in the Southwest will not move at the present basis of rates.* * * Any basis of rates which discourages traffic in a salable commodity, and results finally in the total loss of a large part of it, is at least open to serious question.

However, we have also recognized that this Commission "cannot require the railroad to maintain rates on a basis which contravenes the Act merely because railroads will thereby secure traffic," *Paper Stock in Official Territory,* 214 I.C.C. 588, 599 (1936). Thus, we have been aware of the problems involved with the utilization of scrap materials for some time and have dealt with claims similar to those raised here by various protestants.[1]

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[1] In numerous cases we have approved or required adjustments in the specific rates on waste products where a violation of the Act was involved. See, *e.g., National Ass'n of Waste Material Dealers, Inc.* v. *Ann Arbor R.R. Co., et al.,* 68 I.C.C. 748 (1922) (fifth-class rating and rates on scrap rubber found unreasonable to the extent they exceed sixth class); *Waste Materials Dealers Ass'n* v. *Chicago, R.I. & P. Ry. Co.,* 164 I.C.C. 587 (1930) (scrap iron and steel carload rates to, from and between points in the southwest found unreasonable to the extent they exceed 15 percent of corresponding first-class rates); *Matthiessen & Hegeler Zinc.* v. *The Baltimore & Ohio R. Co.,* 323 I.C.C. 601 (1964) (rates on zinc dross, residue and skimmings found unduly prejudicial and preferential and discrimination ordered removed); *Rate Structure Investigation, Iron & Steel Articles,* 155 I.C.C. 517 (1929) (basis of maximum reasonable rates prescribed on carloads of iron and steel articles in official territory); *Newport News Shipbuilding & Dry Dock Co.* v. *B. & O. R. Co.,* 160 I.C.C. 620 (1929) (rates on scrap iron found unreasonable to extent exceed 70 percent of basic scale of rates on iron and steel articles prescribed in *Iron & Steel Articles,* 155 I.C.C. 517). See also cases cited in *Summer & Co.* v. *Chesapeake & O. Ry. Co.,* 299 I.C.C. 625 (1956); *Iron and Steel Articles—Eastern Common Carriers,* 68 M.C.C. 717 (1957) (reduced rates on manufactured iron and steel articles to meet truck competition found not unlawful); *Edward Campbell Co.* v. *Reading Co.,* 286 I.C.C. 549, (1952) (rates on slag, a

Appendix B

In the more recent general revenue proceedings from 1956 to date, we have discounted the claim that our authorization of the railroads' general rate increases has disadvantaged scrap iron as compared to manufactured iron and steel articles and found that such claim was not established, leaving the final resolution to proceedings defining such issues rather than in general revenue proceedings. Similarly we have rejected contentions that a general increase will affect the competitive relationship between other waste products and virgin materials. See Ex Parte No. 196, *Increased Freight Rates, 1956*, 298 I.C.C. 279, 341 (1956).

In an interim order not suspending certain rate increases in Ex Parte No. 212, *Increased Freight Rates, 1958*, 302 I.C.C. 665, 695 (1958), we found that total tons of scrap iron originated by the railroads in the United States in 1955 and 1956 were, respectively, 5 million and 7 million tons more than were originated in 1947, indicating that the several general freight rate increases since 1946 had not stifled the movement. We permitted the increases on scrap iron for an interim seven-month suspension period but suspended the rates on scrap paper, rags and rubber. In a final report after investigation in the same proceeding, reported at 304 I.C.C. 289, 347-349, we found that an increase of three

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refuse material from removal of iron from iron ore, found unreasonable); see also *Boggs Concrete Products Co.* v. *Atlantic D. Ry. Co.*, 294 I.C.C. 569, 571 (1955); *Waste Paper From, To, and Between Indiana Points*, 206 I.C.C. 127 (1934) (undue prejudice found where proposed rates to Indiana points were higher than rates to points in Michigan and Illinois); *Waste Paper & Other Articles from Wisconsin to Wabash, Ind.*, 316 I.C.C. 464 (1962) (initial truckload rates approved); *Scrap Between D.C. and York, Pa., or Halltown, W. Va.*, 300 I.C.C. 776 (1957) (new motor contract carrier minimum rates on waste paper, rags, paperboard and scrap metals found lawful); *Rag & Scrap Paper to Lockland and Middletown, Ohio*, 308 I.C.C. 770 (1959) (motor contract rates from ten states to Ohio points rejected for failure to show they are compensatory); *Miller Waste Mills, Inc.*, v. *Chicago & N.W. Ry. Co.*, 216 I.C.C. 767, 771 (1936) and *Miller Waste Mills, Inc.* v. *Boston & M. R. Co.*, 229 I.C.C. 431 (1938) (rates on cotton waste, cotton sweepings, and waste other than sweepings found unreasonable); *Asbestos Waste from Canada and Vermont to New Orleans*, 248 I.C.C. 143 (1941) (rate reduction found just and reasonable); *Rubber Scrap from Texas to Memphis, Tenn.*, 304 I.C.C. 384 (1958) (reduced truckload rates on scrap tires and scrap rubber order cancelled without prejudice to filing new proposals which are compensatory.)

percent, maximum 40 cents per ton, will properly relate pig iron and scrap iron materials to the overall adjustment of the rail rates in that proceeding. On scrap paper, rags and related articles, we rejected the proposed increase of 3 percent, maximum three cents per 100 pounds.

In Ex Parte No. 223, *Increased Freight Rates, 1960,* 311 I.C.C. 373 (1960) a scrap iron and steel dealers' association urged that the proposed general increases should not be permitted on scrap iron until a final determination was made in Docket No. 33535, *Institute of Scrap Iron and Steel, Inc.* v. *Akron, C. & Y. R.R. Co.,* filed on August 15, 1960, at our earlier invitation in Ex Parte No. 196, *supra.* In Docket No. 33535, the Institute alleged that the scrap iron rates in the Official Territory were unreasonable in violation of section 1, and discriminatory and prejudicial when compared with rates on iron ore, pig iron and new steel in violation of section 3 of the Act. In rejecting this request to delay consideration, we held at (p. 405):

> • • • Disposition of the various issues presented in the cited proceeding is not determinative of the instant proceeding involving the equal imposition of flat rate increases on all commodities regardless of other considerations relating to the intrinsic reasonableness rate bases used.

We disagreed with the view that the general increases would perpetuate an unsatisfactory rate structure and permitted increases on scrap iron, pig iron and other secondary materials.

On April 2, 1962, we dismissed the complaint in the Docket No. 33535 proceeding directly attacking the disparities in the rate structure on scrap iron and steel, iron ore and pig iron. We concluded that such rates were not shown to be unjust, unreasonable or otherwise unlawful under applicable provisions of the Act. That decision, reported at 316 I.C.C. 55, was sustained in *Frank Adams & Co.* v. *United States* (unreported, Civil Action No. 5093, S.D. Ohio, Western Division, May 8, 1963), aff'd *per curiam,* 375 U. S. 215 (1963), rehearing denied, 276 U. S. 929 (1964).

We found that the decline in the production of steel in 1958-1959 resulted in a like decline in the consumption of

raw materials and in rail carloadings; scrap iron consumption 77.7 percent of 1956-1957 figures, iron ore, 74.4 percent and pig iron, 76.4 percent. Rail carloadings of all the above aggregated 66.5 percent. Stating figures for a 14-year period we found that "the volume of scrap consumption is closely tied to the volume of production of the steel industry." The relationship of scrap consumption to production has varied only within a narrow range of 52 and 57 percent during the same period. (*Ibid.*, p. 56).

Comparing scrap prices with steel production by months for the years 1958-1960, we found that changes in scrap prices regularly precede changes in the volume of steel production (*ibid.*, p. 56). We found the price of pig iron has increased steadily since 1944 from $24.17 to approximately $70.00 in March 1961. Related in terms of percentages using the Bureau of Labor Statistics' price index for July 1960, scrap is 88, or down 12 percent; iron ore 169.7, or up 69.77 percent; pig iron 162.5, or up 62.5 percent; and finish steel 186.7, up 86.7 percent (*ibid.*, p. 57). Meanwhile, the level of scrap iron rates as measured against first-class rates has fallen from 15.2 to 12.8 percent.

We then compared the major differences between scrap and iron ore and pig iron in the movements and distances from origins and destinations, their average weight and loading of shipments, the services employed in transporting each (*ibid.*, pp. 62-63) and found that (*ibid.*, pp. 64-66):

> The evidence establishes that while the volume of scrap consumed has varied with changes in the volume of steel production, the relative consumption of scrap has been stable whether measured in relation to total steel production or in relation to the volume of other raw materials consumed. The totals of the tonnage of industry, as reported by the American Iron and Steel Institute, show that for 1959, compared with 1947-49 averages, scrap was the only major raw material that showed an increase in volume consumed. In the same period, consumption of iron ore decreased 11 percent, coal 23 percent, and limestone 36 percent. The tons of scrap consumed per ton of pig iron produced increased 11 percent between 1948 and 1959, while the tons of iron

ore decreased 10 percent. Pig iron production in both years was 60 million tons. Thus, of the four basic raw materials entering into the production of steel, scrap is the only one which has not declined in consumption per ingot ton produced. The percentage of scrap to iron ore for 1959 was 47.5 percent, as compared with 43.8 in 1958 and 41.5 in 1957.

Scrap and iron ore are major raw materials in the two separate processes by which steel is produced. Blast furnaces perform a smelting process whereby the iron is separated from the impurities in iron ore. Their primary raw materials are the ore, which provides the metallic content of the product, and coke and limestone, ingredients required to produce the chemical reactions in the furnace. The function of a steelmaking furnace, by contrast, is to refine iron and scrap into steel. The primary ingredients are pig iron and scrap. To those primary raw materials are added the small quantities of iron ore, limestone, and other materials required by the chemistry of the process. Scrap in blast furnaces accounts for less than 2 percent of the total charge and to between 2 and 3 percent of the ore. The scrap thus used consists primarily of home scrap and is of a type that is unsuitable for open hearth use, such as broken skulls, pit and ladle scrap, and other contaminated irons. In steelmaking furnaces, the tonnage in scrap consumed amounts to approximately one-half, whereas the iron ore tonnage amounts to only a small fraction, of the tons of steel produced. Since the two commodities are used largely in different processes, there is small room for competition between them.

While scrap encounters no important competition from iron ore, its use in steelmaking furnaces is, to some extent, alternative to the use of pig iron. For example, in 1959 the percentage of scrap to the total tons of scrap and hot metal amounted to 7.8 percent in bessemer converters, 44.1 percent in open hearthes, and 81.6 percent in electric and basic oxygen furnaces. These differences in percentages of scrap consumption are made more meaningful when considered in con-

nection with the relative shares of total steel production by each type of furnace. Of the total production of steel in 1959, bessemer converters contributed 1.5 percent, open hearths 87.8 percent, electric furnaces 8.7 percent, and basic oxygen furnaces 2 percent. Throughout the period 1948-59, the percentages of scrap tons to the total tons of scrap and pig iron consumed in steelmaking furnaces varied from the average for the entire period by no more than 2 percent.

The evidence is conclusive that none of the new processes in steelmaking has had any significant effect upon the proportion of scrap used in the production of steel. The direct charging of iron ore in steelmaking furnaces has been a characteristic of the process throughout its history, and its use in furnaces is not to replace scrap but to supply the oxygen required by the process. The oxygen converter is neither a blast furnace nor an open hearth, but a new type of steelmaking furnace different from either that smelts pig iron and scrap to produce steel.

In 1959, the first year for which separate data for this type of furnace were published by the American Iron and Steel Institute, the total production process amounted to 1,864,338 net tons. In that same year, scrap consumption in steelmaking furnaces amounted to 45,846,896 net tons, equal to 49.7 percent of the 92,175,540 net tons of ingots and castings produced in that year.

The use of oxygen converters has not had any significant effect upon the consumption of scrap by the steel industry. The use of oxygen lances tends to limit the amount of ore charged to open-hearth furnaces. The use of gaseous oxygen has not changed the ratio of scrap to pig iron, and there is no indication that it will do so in the future. Purchased scrap has provided a nearly constant portion of the total scrap consumed by the steel industry, reflecting 1955-59 percentages of 41, 43, 38, 37, and 40, respectively.

Between 1956 and 1959, scrap consumption was on approximately the same level as steel production, and it was iron ore, not scrap, which suffered the decline

in consumption during this period. Total steel industry consumption of scrap in 1959, 47.5 percent, was higher in relation to iron ore consumption than in any previous year since 1952.

Finally, we concluded that (ibid., pp. 66-67):

It seems clear that scrap iron has not been at a market disadvantage in comparison with iron ore and pig iron. There is no evidence before us which would suggest that the difficulties testified to by the scrap dealers since 1958 are attributable in any major degree to the rates on iron ore, pig iron, or manufactured iron and steel. The difficulties of the scrap dealers result from the decline in steel production beginning in 1958, and the increasingly severe competition among scrap dealers and brokers.* * *

There remain for consideration the claims that the present rates on scrap iron are unjust and unreasonable per se.* * * As noted, the present scrap rates average 12.8 percent of the basic No. 28300 first-class rates. None of the rates that move traffic, as shown by the defendants' traffic study, is in excess of 21 percent of the first class.* * *

The rates on scrap iron and on other raw materials of the steel industry have always been made to reflect circumstances and conditions particular to each transportation service.* * * An analysis of the short-haul movement in the traffic study shows that out of a total of approximately 4,300 carloads which moved for a short-line distance of 50 miles or less, about 3,200 moved for the account of members of the Institute. The rates at which the traffic moved reflected an average of approximately 10 percent of first class. Many of the rates shown by the complainants are between points where there is no movement. For the most part, the prevailing scrap iron rates at the 8-percent basis are lower than the pig iron rates, despite the fact that pig iron has an 18-percent higher average loading than scrap iron. Moreover, some of the pig iron rates used for comparative purposes have been reduced to meet water competition; for example, the water-competitive rates from Buffalo, N. Y., to Philadelphia and

Baltimore, and the water-truck competitive rates from Buffalo to Coatesville and Phoenixville, Pa.

Undue preference and prejudice must be shown by clear and convincing evidence. Substantial similarity in transportation conditions, and a real disadvantage by reason of the assailed rates, must be shown. Such a showing has not been made on this record. As noted, the transportation characteristics of iron ore, pig iron, manufactured iron and steel, and scrap differ widely. Moreover, there is no justification from a transportation standpoint for requiring a rigid relationship between the rates on scrap and the rates on any of these other commodities.

In Ex Parte No. 256, *Increased Freight Rates, 1967*, 332 I.C.C. 280, 328 (1968), we again considered contentions that increased rates on scrap commodities were not justified. We discussed the two major categories of scrap iron and steel, new processing techniques for scrap and the various types of furnaces used in steelmaking and concluded that the increases on scrap iron and steel should be held to those permitted on iron ore. On other secondary waste and scrap materials (other than ferrous metals), we concluded that the proposed increases are just and reasonable except that rates on scrap paper and rags may not be increased more than one cent on shipments of 50,000 pounds or more in the south. (Ibid., pp. 331-333).

In Ex Parte No. 259, *Increased Freight Rates, 1968*, 332 I.C.C. 714 (1969), as in prior proceedings, protestants called attention to the public interest in removal and utilization of scrap and the importance of maintaining a viable industry dedicated to this task. Upon a more detailed evidentiary presentation, we concluded that justice would be done if scrap iron and pig iron bear the same share of the additional revenues needed by the railroads and limited the increase to the same amount. We commented (*ibid.*, p. 743):

> In the steelmaking process both scrap iron and pig iron compete as major components of the charge in the furnace. Integrated steel producers supply their pig iron needs by manufacture within their own complex. The primary component of the charge in the blast

furnace, which produces pig iron, is iron ore. A substitute for both pig iron and scrap is high-grade iron ore which has been subjected to other processes which increase its iron content to well over 90 percent. Thus, while the rates on these various commodities are not necessarily related, we are of the opinion that, under current conditions, and where the issues involve the increase in contribution necessary to meet a revenue need, the burden should be imposed in substantially similar fashion. We find that the increases on pig iron and iron and steel scrap, item No. 845 of the master tariff, should not exceed those applied to iron ores, item 1060.

As to the proposed increases on nonferrous scrap of five percent, minimum one cent per 100 pounds, or 25 cents per ton, net or gross, we found the proposed minimums are patently inconsistent and allowed one cent per 100 pounds, 20 cents per net ton, or 22 cents per gross ton (*ibid.*, p. 769).

With respect to rates on other scrap and waste materials, we found the increases would not exceed the maximum level of reasonableness or create an undue burden on this traffic (*ibid.*, p. 771).

In Ex Parte No. 262, *Increased Freight Rates, 1969*, 337 I.C.C. 436 (1970), we rejected the claims that a uniform six percent increase discriminates against scrap iron in favor of iron ore and the proposal that the rates on such materials should be made to reflect the relative amount of iron (units) in each. We held (*ibid.*, p. 474):

> We find no merit in the Institute's contentions. In the context of the issues in this proceeding we cannot go behind the basic rates in effect November 17, 1969. Moreover, the basic rate structures for iron ore, pig iron, and scrap iron are entirely unrelated. *Institute of Scrap Iron & Steel, Inc.* v. *Akron, C. & Y.R.*, 216 I.C.C. 55. As in Ex Parte No. 259, we conclude that, "while the rates on these various commodities are not necessarily related, we are of the opinion that, under current conditions, and where the issues involve the increase in contribution necessary to meet a revenue need, the burden should be imposed in substan-

tially similar fashion." (332 I.C.C. at 743.). The uniform 6-percent increase applied to the basic rates on these commodities will accomplish this purpose. We find no violation of section 2 or 3 in the manner in which the 6-percent increase has been applied on iron ore, pig iron, and scrap iron.

We also rejected claims of discrimination by dealers of other waste and scrap materials, concluding that (*ibid.*, p. 475):

> • • • Attacks on the basic rate structures are beyond the scope of this investigation. There is no probative evidence of record upon which we could find that the 6 percent increase as applied to these commodities has resulted in violation of Section 2 or 3.

In Ex Parte Nos. 265 and 267, *Increased Freight Rates, 1970 and 1971*, 339 I.C.C. 125 (1971), we discussed these same issues in terms of the Interstate Commerce Act and the National Environmental Policy Act as well, stating (ibid., pp. 205-211):

> Protestants assert that a low-grade commodity such as iron and steel scrap is extremely sensitive to changes in freight rates. Between 1961 and 1966, when there were no general freight rate increases, the price of scrap fluctuated between $24 and $39 per ton. The price of No. 1 heavy melting scrap increased from $27.64 per gross ton in 1967 to $43.50 in 1970, an increase of nearly 60 percent, in spite of the increased freight rates during that same period. The prices of pig iron and iron ore advanced only slightly. In addition, protestant's figures for the ratio of purchased scrap consumed show erratic behavior during those years. The position of purchased scrap improved from 19.9 percent in 1966 to 20.3 percent in 1967, and again to 20.9 percent in 1968, followed by a drop to 19.4 percent in 1969. The only conclusion warranted on this record is that there is little, if any, correlation between rail freight rates and the market for iron and steel scrap. We are not persuaded that rail freight rates on scrap have any material impact on the de-

cision which result in removal of wrecked automobiles and other scrap metals pursuant to antipollution measures [*ibid.*, p. 205].

Turning to the differences in the transportation service performed in connection with ferrous scrap and iron ore, we rejected the contention that scrap iron and iron ore specifically and directly compete to the extent that they require similar rate treatment finding that (*ibid.*, p. 207):

> • • • In the light of the demonstrated intervening processing required of ore to transform it into a competing product, we adhere to our conclusions in Institute of *Scrap Iron & Steel, Inc.* v. *Akron, C. & Y.R.*, 316 I.C.C. 55. In our recent decision in Ex Parte No. 262 we found that a uniform percentage increase applied to the basic rates on both scrap iron and iron ore was equitable to both. We are not persuaded that the competition between these two commodities is so direct as to require any different finding in this proceeding.

Recognizing that NEPA expresses the concern which the Government and the Nation as a whole have with control of activities which result in pollution of the atmosphere and environment, the possibility that increased freight rates may tend to restrict the movement of scrap iron and other waste materials and thus, indirectly, detract from efforts being made to gather and recycle such materials and the need to encourage the shipment of pollutants, we stated (*ibid.*, pp. 208-209):

> It is unnecessary to elaborate upon the importance of the program instituted by the National Environmental Policy Act, or the severity of the problems with which it is concerned. We share that concern and, to the extent that it lies within our statutory authority, propose to assist in the implementation of the objectives of the act. See: *Transportation of "Waste" Products for Reuse and Recycling*, order entered December 21, 1970, Ex Parte No. MC-85. At the same time, we deal with the national need for a viable transportation system, and the constitutional rights of all parties to these proceedings to a full and fair

hearing and a decision based upon the evidence of recored. The United States Department of Transportation has urged that we approve the freight rate increases as sought without further delay. It asserts that arguments of the protestants to the contrary must be rejected because:

> (1) They were submitted before the recommendations of the President's Emergency Board and do not reflect the impact of that recommendation; (2) They make no provision for the cost of complying with the Rail Safety Act of 1970; (3) They assume that long overdue maintenance and necessary capital improvement programs can be funded without regard to deficits in net operating income; (4) They are based on an assumption that the financial problems of weak roads can be selected out for special treatment.

The Department estimates that the railroads' revenue needs as set forth in the ASTRO report are understated; concluding that in the 12-year period from 1969-1980 capital needs will be $44.72 billion or 3.73 billion annually. It notes that even if the railroads actually realize the full amount of the increase sought in this proceeding, the rate of return on investment will remain below desirable levels, and that improvements in service are not free.

As we have found, there is no basis in the evidence for finding that the proposed increase on iron or steel scrap will be detrimental to the antipollution program because of any resulting advantage to the movement of iron ore. There has been demonstrated no price bias against secondary materials due to the application of the rate increase herein proposed. If any such bias exists in the underlying rate structure it should be brought to our attention in the pending rate structure investigation, Ex Parte No. 270, where it can be evaluated on a proper record.

Generally, the scrap and waste materials which we have considered above are produced by particular industries other than the respondents or by the Nation as a whole, i.e., automobiles, cans, et cetera. In large part,

the railroads rates on commodities of these types are now at a low level and it is not contended that they produce unreasonable returns for the service performed. It is clear that whenever a commodity is carried at less than fully allocated cost, some other shipper of another commodity must pay the difference if the carrier is to continue in business. We believe that the transportation industry, like all other segments of the economy, must contribute to the control of pollution. The extent and manner in which this is to be accomplished is largely a matter of judgment. Since Ex Parte No. 267 is supported, at least in part by the need for improvement in the respondents' net revenues we believe that some allowance may be made for environmental considerations. Upon consideration of the entire record herein, we conclude that increases in rates and charges herein authorized under Ex Parte No. 267 shall be limited as follows:

On fly ash—the increase shall not exceed 8 percent.

On iron and steel scrap—the increase shall not exceed 11 percent.

On petroleum waste products—the increase shall not exceed 8 percent.

On nonferrous and alloy scrap and textile and paper scrap—the increase shall not exceed 11 percent.

We shall also, in the light of our findings in this and prior cases respecting the propriety of applying equally the increases on scrap iron and steel, pig iron, and iron pellets of high Fe content comparable to scrap iron and steel, require the increases on such commodities to not exceed 11 percent.

In our report in the above proceeding, we discussed petroleum refinery wastes and waste sulfide (*ibid.*, pp. 201-203), secondary materials such as nonferrous metals and alloy scrap, waste paper, rags and textile waste (pp. 203-204) and fly ash (pp. 204-205). Likewise, although a fifteen percent increase was sought on pig iron and iron ore, our findings limited the increase on pig iron and iron pellets having the content comparable to pig iron or scrap iron

to not more than 11 percent, the same amount sanctioned for scrap iron and steel, but approved a twelve percent increase on iron ore (*ibid.*, pp. 209, 211, 219).

APPENDIX C

Original Equivalence Formula

Scrap Iron		Iron Ore		Metallurgical Coal
9,000 lbs (95% FE)	=	3,167 lbs (65% FE)	+	602 lbs
×		Rail Share of Total Movement		×
		×		
Scrap Iron		Iron Ore		Metallurgical Coal
74%		58%		65%
=		Rail Shipment Proportion Basis		=
		=		
Scrap Iron		Iron Ore		Metallurgical Coal
1,480 lbs		1,837 lbs		391 lbs
×1.51		Revised Equivalence Formula (on gross ton basis)		×1.51
		×1.51		
Scrap Iron		Iron Ore		Metallurgical Coal
2,240 lbs		2,780 lbs		592 lbs
×		Cost to Transport		×
		×		
Scrap Iron		Iron Ore		Metallurgical Coal
20.6¢/cwt		8.2¢/cwt		14.2¢/cwt
=		Net Effect Per Ton		=
		=		
Scrap Iron		Iron Ore		Metallurgical Coal
$4.61 Does *Not* Equal		$2.28	+	.84

Discrimination = $1.49 per ton of scrap iron ($4.61- ($2.28 + .84))

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 5th day of March, 1973.

EX PARTE NO. 281

INCREASED FREIGHT RATES AND CHARGES, 1972
(Environmental Matters)

The Commission having thus made a report on its investigation of the environmental effects of increases in rail freight rates and charges on the movements of commodities being transported for the purposes of recycling approved by this Commission in our prior report in this proceeding reported at 341 I.C.C. 288; that this said report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That any interested person may file comments regarding the said report herein within 30 days from the date of service of this order.

It is further ordered, That this proceeding be, and it is hereby, held open for further consideration of the environmental effects of the proposed rail rate increases on recyclable commodities after receipt of the comments requested in the prior ordering paragraph.

ROBERT L. OSWALD,
Secretary.

(SEAL)

[*Verified Statement No. 18, Affiant: J. W. Hoeland*]

BEFORE THE INTERSTATE COMMERCE COMMISSION

IN SUPPORT OF RAILROADS' PETITION FOR 2½ PERCENT SURCHARGE ON FREIGHT RATES AND CHARGES

VERIFIED STATEMENT OF J. W. HOELAND, VICE PRESIDENT, MARKETING, LOUISVILLE AND NASHVILLE RAILROAD COMPANY

December 1971

My name is James W. Hoeland. I am Vice President-Marketing of the Louisville and Nashville Railroad Company. My business address is 908 West Broadway, Louisville, Kentucky—

40201. As Vice President-Marketing I hold the primary responsibility for pricing, marketing, and market research for account of the Louisville and Nashville Railroad, which includes such activities as the study and analysis of traffic conditions and marketing potential of the L&N; the negotiation and establishing of freight rates and charges and routes; the division of joint rates, and the determination of the L&N's participation in traffic related proceedings before the Interstate Commerce Commission and state regulatory bodies.

The Louisville and Nashville Railroad Company operates approximately 6,500 miles of railroad serving 13 states, primarily in the southeastern part of the United States. I am familiar with the freight traffic conditions in the area served by the L&N Railroad and am generally familiar with freight traffic matters on a nationwide basis. I have actively participated in numerous discussions and meetings with the Chief Traffic Officers of the Nation's railroads, and specifically with the Chief Traffic Officers of the Southern Territory railroads, concerning necessity of seeking increased freight rates and charges at this time. It was essential that we consider ways to increase the railroads' revenues due to the continuing increases in the cost of doing business, chiefly, increases in wages and the cost of materials and supplies.

The Louisville and Nashville Railroad Company finds it necessary to join with the Nation's railroads in seeking increases in freight rates and charges, which will in the aggregate, produce increased revenues needed to help partially offset increases in expenses. The general deteriorating situation with respect to railroad earnings is well known and highlights the emergency nature of the 2.5 percent increase sought.

As I have previously stated, as Vice President-Marketing, I am charged with the pricing of the L&N's freight service and keep constant review of the effect of pricing on L&N's traffic. The minimal nature of the 2.5 percent increase sought in this proceeding, in my opinion, will impose no hardship on the users of rail service, and thus will have little or no diversionary effect. All competing transportation agencies are subject to similar economic factors that affect the rail carriers, since rising costs are a matter which all modes of transportation have in common. I do not visualize any shift in traffic patterns as result of this modest increase. But, if diversion becomes a serious factor, all practical steps will be taken by way of rate adjustments to pro-

tect the traffic threatened by diversion. More importantly, I feel that if the increases sought are not authorized, diversion may become a real problem due to railroads' financial inability to keep pace with the equipment and service demands of the shippers. Often the danger of diversion is not from an increase in rates, but from the railroads' inability—in the absence of rate relief—to make expenditures for equipment and other programs which are necessary to remain competitive and progressive.

The railroads are now confronted with additional large increases in expenses, such as those arising from agreements recently consummated with various operating and non-operating crafts. For the Louisville and Nashville Railroad the increase in these expenses is estimated to amount to over $14,000,000 per annum. The L&N experienced an increase of over $4,000,000 during 1971, in the amount it must pay to obtain the necessary fuels, materials and supplies to operate its railroad system. Thus faced with $18 million in increased costs the early approval of this rate proposal is an absolute necessity and is most conservative since a straight 2.5% increase in freight rates would produce annual revenues of only an estimated $8.5 million. Necessary exceptions to the 2.5% proposal will, of course, increase this cost over revenue spread.

It is essential that the L&N, as well as other railroads, keep pace with technological improvements in railroading. The L&N has done everything practical through capital expenditures to reduce unnecessary expenses and to make all phases of its railroad operations more efficient, taking advantage of new developments and technology to accomplish full utilization of its railroad lines. Also, in order to satisfy the existing and growing needs of its shippers; to provide for ever increasing needs for specialized equipment; to provide fast, flexible service; and to meet the ever increasing competition of other forms of transportation, the L&N has in the past been, and will in the future be, compelled to expend large sums of money for improvements and modernization of its railroad plant and facilities. Unfortunately the L&N's present level of income, in view of rising costs, will not support such a program. But, these expenditures are essential if the L&N is to meet its obligation to the shipping public, and to sufficiently maintain its equipment to meet any national emergency. So, if the L&N is to continue to spend huge sums of money for efficiency improvement and continue modernization of its railroad plant and facilities, increased revenue

as sought in this proceeding is necessary to help provide adequate working capital to implement such a program.

In addition, the L&N, along with all other railroads, is faced with expenditures running into the millions of dollars to carry out required programs to abate pollution, and to maintain its tracks to standards provided for by recently enacted Federal law.

The only way the railroads can obtain a higher level of revenue at this time is through an increase in freight rates and charges, and it is essential that the increases sought in this proceeding be permitted to become effective as soon as possible to at least partially offset increased expenses being incurred by the railroads. I am convinced that the granting of the sought increase will not cause substantial diversion of traffic, but will produce much needed additional revenues with which the L&N can continue to update its railroad plant and facilities and thus continue to meet the requirements of the shipping public and of the national defense for efficient, modern and essential railroad service.

VERIFICATION

STATE OF KENTUCKY
County of Jefferson, ss.

James W. Hoeland, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

/s/ JAMES W. HOELAND.

Subscribed and sworn to before me this 6th day of December, 1971.

/s/ F. R. WILTON.

My commission expires December 5, 1973.

[*Verified Statement No. 22, Affiant: L. C. Hudson*]

BEFORE THE INTERSTATE COMMERCE COMMISSION

IN SUPPORT OF RAILROADS' PETITION FOR 2½ PERCENT SURCHARGE ON FREIGHT RATES AND CHARGES

VERIFIED STATEMENT OF L. C. HUDSON, VICE PRESIDENT, TRAFFIC, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

December 1971

I am L. C. Hudson, Vice President-Traffic of The Atchison, Topeka and Santa Fe Railway Company, 80 East Jackson Boulevard, Chicago, Illinois 60604. I have been employed in the Santa Fe Traffic Department since 1945. I have general supervision over the establishment of pricing for transportation services and over the freight sales staff of the Santa Fe.

Santa Fe railroad operations are conducted in the states of Arizona, California, Colorado, Illinois, Iowa, Kansas, Louisiana, Missouri, Nebraska, New Mexico, Oklahoma and Texas. General traffic offices are located at Chicago, Illinois, Los Angeles and San Francisco, California, Phoenix, Arizona, Albuquerque, New Mexico, Topeka, Kansas, and Amarillo and Dallas, Texas. In addition, over sixty other traffic offices are maintained at strategic locations throughout the United States, including both on-line and off-line points. I am in constant contact with all of the traffic offices and regularly receive reports from each advising me as to general business conditions within each area as well as information as to freight traffic moving from, to and within each respective territory. These reports include statistical data and comments on traffic handled, traffic potential, trends of movements of specific commodities, general business trends and any items of interest that may possibly pertain to the Santa Fe or any of its competitors. The regularly scheduled reporting by the traffic offices allows me to closely observe our business, traffic trends, the position of our competition, and business conditions in general.

Santa Fe, like the railroad industry generally, is endeavoring to satisfy customer needs and demands. To fail to provide adequate service to the shipping public would ultimately result in a railroad system unable to discharge its public obligations. In order to provide the services that shippers require it is essential that revenues be sufficient to cover the investments nec-

essary not only to maintain but to expand and improve our service to the shipping public. The only way any organization dedicated to providing service to the public can survive, let alone prosper, is to have revenues sufficient to pay all costs of operation, interest and debt repayment to creditors and, in addition, to cover the capital requirements for plant and facilities improvements. Santa Fe is no different from any other business in this respect. Shippers cannot be expected to patronize us if we do not provide good service or equipment and we cannot give good service or furnish good equipment if we must retrench and defer maintenance because of failure to generate a healthy level of revenues. Santa Fe's rate of return on investment has been less than four percent for the past four years. Such continued low levels will not produce sufficient earnings to support the level of expenditures necessary for the Santa Fe to provide a quality service which our customers have a right to expect.

The 1972 capital budget program of Santa Fe calls for an expenditure of $63 million for the acquisition of 52 new diesel locomotive units, and 1,325 new freight cars of various types, plus 50 rebuilt locomotive units and 568 rebuilt cars. In addition, we already face sharply rising labor costs; any increase in labor costs to us is significant because that expense alone amounts to over 56 percent of our cost of operation.

Santa Fe supports this application without reservation. It is realized that in any increase proceeding very careful consideration must be given to the possibility of traffic being diverted from rail to other forms of transportation. It has been our experience that the risk of diversion is minimized because those factors creating increased costs, such as labor, equipment and material, are not peculiar to, nor confined to, the railroad industry but are common to all modes of transportation. Competitors of the railroads, therefore, are to a certain extent faced with similar cost problems and their consequent action has generally been to increase their rates. Accurate statistics for private or proprietary transportation are most difficult to obtain, however, I believe their operating costs keep pace with those of common carrier operations. In my opinion, the 2½ percent level of this increase is so low that its application will have no appreciable influence overall in diverting traffic to other forms of transportation. Furthermore, our competitors will also find it necessary to seek increased revenues to offset higher costs.

The possibility exists, of course, that application of the increases may require pricing adjustments to meet changing marketing and competitive conditions. Where competitive forces cause the threat of diversion of traffic the Santa Fe will give careful consideration to all proposals, as has been done in the past, contemplating changes or adjustments in the freight rate structure seeking to maintain rates that will move the most traffic commensurate with the cost of doing business. To the extent that readjustments may become necessary, we will exercise our best judgment in making necessary competitive rate changes where economically feasible to meet our common carrier responsibilities.

It should be noted that the carriers propose to apply the 2½-percent surcharge to protective service charges. Santa Fe has a particular interest in the adequacy of charges for protective service provided in mechanical refrigerator cars and trailers and in ice bunker cars because our company is one of the largest owners in the United States of this type of equipment. Costs studies, which have been presented to the managements of Santa Fe and the other railroads and car lines which own mechanical refrigerator cars, have demonstrated that present charges for mechanical protective service fall far short of covering the cost of providing this service. These studies cover increased costs through April 1, 1971, and are part of the record now pending before the Commission in Investigation and Suspension Docket No. 8637, *Mechanical Protective Service of Perishables—Nationwide*. The instant proposal for a 2½-percent surcharge is fully supported by cost increases which have been incurred since April 1 of this year and those costs should properly be added to the increased costs demonstrated by the carriers in I&S No. 8637. My remarks above at pages 2–3, regarding the necessity of sufficient revenues to provide adequate service, have particular application to protective service charges. The mechanical protective service car is the most expensive single type of freight rolling stock which Santa Fe owns. We cannot continue to satisfy the critical demand for this vital service unless we are permitted to meet increased costs with increased revenues.

In summary, I urge the Commission to permit the proposed 2½-percent surcharge to become effective at the earliest possible date. It is essential if the railroads are to generate sufficient revenues to maintain adequate service, provide the necessary equipment for the transportation needs of its customers

and to help attract new ones. I do not believe the surcharge will cause any significant diversion of traffic to other forms of transportation but, to the extent that necessary competitive rate adjustments are indicated, such adjustments will be made.

VERIFICATION

STATE OF ILLINOIS
County of Cook, ss.

L. C. Hudson, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

L. C. HUDSON.

Subscribed and sworn to before me this 3rd day of December, 1971.

C. D. CROTZ.
Notary Public of Cook County.

My commission expires January 14, 1973.

[*Verified Statement No. 27, Affiant: A. Paul Funkhouser*]

BEFORE THE INTERSTATE COMMERCE COMMISSION

IN SUPPORT OF RAILROADS' PETITION FOR 2½ PERCENT SURCHARGE ON FREIGHT RATES AND CHARGES

VERIFIED STATEMENT OF A. PAUL FUNKHOUSER, SENIOR VICE PRESIDENT, SALES AND MARKETING, PENN CENTRAL TRANSPORTATION COMPANY

December 1971

My name is A. Paul Funkhouser. I am Senior Vice President-Sales and Marketing of Penn Central Transportation Company. In that capacity I have the responsibility for all sales, marketing and pricing activity in connection with the freight service of the Penn Central.

Penn Central has joined in this industry petition for permission to increase freight rates because it is important that Penn Central's freight revenues be increased promptly to offset increased costs which the railroad is experiencing. I estimate that if the railroads are permitted to apply a 2½ percent surcharge to freight bills Penn Central will be able to realize in-

creased freight revenues of approximately $30 million annually. In the context of the deficit of $221 million, on a fully accrued basis, which Penn Central incurred during the first ten months of 1971, it is clear that the increase is urgently needed by Penn Central.

I have given consideration to the question of what effect such a realized increase in freight rates and charges would have on Penn Central's business. In my judgment, it would have no more than a minimal or almost unnoticeable effect on the movement of traffic.

One factor that is important in arriving at this judgment is the size of the sought increase. The increase proposed is small. It is unlikely, in my judgment, that shippers will change routing as a result of the application of the proposed increase.

Penn Central will keep its competitive situation under close study through our marketing, sales and pricing groups to make sure that the sought increase is not applied to such rates as would cause diversion of traffic. This would be part of a continuous activity. The following table, which shows some of the many rail rate reductions voluntarily made by eastern railroads in recent months, is an indication of the fact that Penn Central does not intend to price itself out of the business. I would not be in support of this increase if it appeared that the result would be diversion of traffic.

Commodity or service	Effective date	Percentage of decrease	Territory
TOFC plans II and V	July 17, 1971	8	Within East.
TOFC plans II¼ and III	June 19, 1971	6	Within East.
Salt	Oct. 1, 1971	12	New York and Ohio Seaboard.
Wheat	Aug. 27, 1971	30-45	Ohio to Pennsylvania.
Sand	June 19, 1971	4-5	Mapleton, Pa. to Pennsylvania and New York.
Lime	Sept. 16, 1971	9	Woodville, Ohio to Whistee, Mich.
Fuel oil	July 1, 1971	9	New Haven, Conn. to Springfield, Mass.
Cement	Oct. 1, 1971	20	Detroit, Mich. to Cleveland, Ohio.
Limestone	June 30, 1971	9	Bellefonte, Pa. to Orion, Pa.
Steel bars	Aug. 28, 1971	9	Youngstown and Warren, Ohio to Wyandotte, Mich.
Corn	Sept. 18, 1971	16	Within East.

Most of the rate changes that have occurred since April 12, 1971, when the *Ex Parte No. 267* increase became effective, have been reductions such as those that I have shown in the above table. Since that time the railroads have experienced increased

costs. I am of the opinion that a general level of rates 2½ percent higher than the present rates, which generally are at or lower than the level approved by the Commission in the *Ex Parte No. 267* case, would not be unreasonably high.

It has been my experience that sometimes shippers or other commercial interests consider rate relationships to be a matter of greater importance than the level of the rates. However, the proposed increase is small and would not cause a meaningful change in rate relationships.

COMMONWEALTH OF PENNSYLVANIA
County of Philadelphia, ss.

A. Paul Funkhouser being duly sworn deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

A. PAUL FUNKHOUSER.

Subscribed and sworn to before me this 6th day of December, 1971.

CHARLES E. CASSEL, Jr.,
Notary Public, Philadelphia, Philadelphia County.

My Commission expires July 14, 1975.

[*Verified Statement No. 37, Affiant: Charles L. Smith*]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 281, Increased Freight Rates and Charges, 1972

IN SUPPORT OF RAILROADS' PETITION FOR 2½ PERCENT SURCHARGE ON FREIGHT RATES AND CHARGES

VERIFIED STATEMENT OF CHARLES L. SMITH, CHAIRMAN, TRAFFIC EXECUTIVE ASSOCIATION, EASTERN RAILROADS, ON ENVIRONMENTAL CONSIDERATIONS

January 3, 1972

My name is Charles L. Smith. I am Chairman of the Traffic Executive Association—Eastern Railroads with headquarters at Two Pennsylvania Plaza, New York, N.Y. 10001. I have been engaged in rate and traffic work for the railroad industry in the East for the past 25 years.

In its report of December 22, 1971, the Commission noted that the railroads' original presentation did not include a statement with respect to environmental impact and expressed the expectation that a statement on the subject would be submitted forthwith. My statement on the subject is submitted on behalf of all railroad respondents.

In seeking to implement the directives of the National Environmental Policy Act of 1969, this Commission instituted a proceeding designated as Ex Parte No. 55 (Sub-No. 4), *Implementation—Nat. Environmental Policy, 1969*, 339 I.C.C. 508. At page 527 of the report, the Commission suggests five considerations which should be taken into account in developing a detailed environmental statement in "major" federal actions. I express no opinion as to whether this is a "major" federal action under the terms of NEPA, and I am aware that the measures publicized by this Commission are still in the status of proposed rules. Nevertheless, my remarks herein are addressed to those five stated considerations, viz.:

1. The environmental impact of the requested action;

2. Any adverse environmental effects which cannot be avoided should the requested action be granted;

3. Alternatives to the proposed action;

4. The relationship, if any, between local short-term uses of man's environment and maintenance and enhancement of long-term productivity; and

5. Any irrevocable and irretrievable commitments of resources which would be involved in the requested action should it be granted.

In my opinion, there will be no adverse effect upon the environment. There is no practical alternative to the proposed action, and any "environmental impact" will come only as the result of a deterioration in railroad service due to lack of funds, if the proposed 2½-percent surcharge is not permitted to go into effect. I will not dwell upon the urgency of the railroads' financial needs. These are set forth in the statements of Dr. Behling and individual railroad officials and require no elaboration on my part. It is fair to state, however, that in the last few general increases, there was at least as much public opposition on the grounds of allegedly poor railroad service as there was to the increase *per se*. Yet, poor service and an inefficient plant are the inevitable effects of insufficient revenues.

Environmental considerations submitted in railroad rate cases usually take one of two forms. It is alleged that an increase on a particular commodity will divert the traffic to motor carrier and thus add to air pollution in industrial centers, or it is contended that the increase will impede or foreclose the movement of a commodity which would otherwise be recycled. In the former instance, however, I should like to point out that if traffic is diverted to another mode because of a maladjustment in rates, the machinery is readily at hand to correct the imbalance on 30 days' notice by tariff publication. On the other hand, if traffic is lost because of lack of equipment or poor service due to a deteriorated plant, there can be no immediate recovery and perhaps none at all. In these instances, it takes the expenditure of funds for capital improvements, equipment, and restoration of adequate service for a period of time before the traffic can be attracted back to the railroad. In this statement, I rely not only on the accompanying statements of railroad officials, but on my years of experience in dealing with hundreds of rate adjustment proposals over the past years. It is, accordingly, my best judgment that any possible adverse environmental impact in the form of reduced movements of commodities by rail will come only if we fail to provide adequate and efficient service. And while we are all concerned with the environmental problems today, the problem of efficient rail service—indeed, rail service in any form—is at least as pressing.

In recent years, certain shippers which are heavily dependent upon rail service, such as National Steel (V–244, Ex Parte No. 265) and others (V–335, V–157, V–12), have recognized the railroads' need for increased revenues in order that service could be maintained and improved. The necessity for continued rail service and its importance to the economy is well stated in the following excerpts from the House Report on the Emergency Rail Services Act of 1970, thus:

> This emergency bill is designed to prevent a clear threat to the public welfare. The nation's largest transportation system, Penn Central, will cease within a matter of weeks, with an overwhelming impact to be felt in every region of the United States. Three other railroads, serving critically important centers in the Northeast, are in perilous condition. All are bankrupt. Their survival so tenuously hangs in the balance that the severity of this winter could bring them to a permanent halt.

At jeopardy is utility power to 74 million people, foodstuff to eight of the nation's largest cities and major movements of iron ore, steel and other commodities basic to the economy.

The legislation is an interim measure to avert an immediate crisis. It will reach only essential rail services which now face cessation. And it will reach them only when self-help can no longer find the cash needed to continue.

* * * * *

It is clear that the maintenance of a sound railroad transportation system and a healthy national economy is dependent upon continued performance of essential rail service by all segments of the system. (U.S. Code, Congressional and Administrative News, 91st Congress—Second Session, Vol. 3, pp. 5983–5.)

My predilection for emphasizing the immediate revenue needs for the continuation of railroad service is easily understandable. Five of my principal members, PC, B&M, CNJ, LV, and Reading, are now in reorganization, and I am very much aware of their constant efforts to maintain service and improve their traffic volume. In my judgment, there is no available alternative to the proposed surcharge which will provide an immediate increase in railroad revenues, It is theorized, for example, that certain commodities should be excepted or favored with a lesser increase, but then the burden must fall more heavily on other commodities which may be more susceptible to diversion to highway, in which case, at least in the view of some, there is an increase in air pollution and no benefit whatsoever to the nation's rail service and overall economy.

Certain shippers may contend that an overall percentage increase will adversely affect the movement of their commodities, which in turn will impede recycling of the material. The scrap iron industry is a case in point. However, it is my judgment that no such result could possibly obtain by reason of a 2½-percent surcharge.

In previous proceedings, the scrap iron industry, usually through the Institute of Scrap Iron and Steel, Inc., has contended that any increases in scrap iron rates must be held down to those applied on iron ore. Failure to do so, said the Institute, would adversely affect scrap iron vis-a-vis iron ore

in the market place. Yet, from industry publications, it has long been apparent that there is no connection whatsoever between scrap prices and iron ore prices nor between scrap prices and freight rate levels.

In Ex Parte No. 256, for example, the industry complained that the low price of scrap and the allegedly high rail rates were "contributing to the marginal profits of the industry (see 332 I.C.C., p. 329), and in Ex Parte No. 259 it was alleged that higher rates on scrap iron would dry up the movement (see Protest No. P-243, pp. 7–8). Since Ex Parte No. 259, however, and despite successive increases in railroad rates and the absence of any comparable price change in iron ore and pig iron, scrap iron prices (No. 1 Heavy Melting Scrap) rose from $27.64 per ton in 1967 to $43.50 per ton in 1970, and the price gyrations have by no means ceased. According to the Wall Street Journal of December 22, 1971, scrap prices rose by $4.25 per ton over the previous month.[1] As stated:

> According to some dealers, much of the buying was coming from brokers who, anticipating strong scrap demand in February and March, are building inventories to be ready for the surge.

Foreign demand can play an important part in scrap prices, as related by an American Iron and Steel Institute publication, "Charting Steel's Progress During 1970":

> Foreign demand for steel scrap soared in 1970 causing prices to skyrocket and threatened a critical shortage.

Developments in the steelmaking industry are also favorable for scrap, as shown in the reference in the Institute's protest herein (p. 4) to the planned development of the Q–BOP process which "can use up to 20 percent more scrap metal per heat than can a basic oxygen furnace".

In summary, it is my conclusion that the use and price of scrap iron are wholly unrelated to railroad freight rates and will suffer no adverse effect from the proposal here. As noted by the Commission in Ex Parte No. 267 an increase of 15 percent would increase the average scrap iron rate by 76¢ per ton (339 I.C.C., pp. 206–7). On that basis, the proposed 2½-percent surcharge would mean an increase of approximately 14¢

[1] It is my understanding that scrap iron and certain other commodities may be exempt from Price Commission regulations as second-hand materials.

per ton on a commodity wherein the price can fluctuate by more than $4.00 per month.

In this same connection, it should be noted that the railroads have already made a substantial contribution to the cause of ecology in the form of the holddowns prescribed by the Commission in Ex Parte No. 267 on scrap iron, fly ash, petroleum wastes, nonferrous scrap, and textile and paper scrap. These holddowns were expressly prescribed "as a matter of judgment" on "environmental considerations" (339 I.C.C., p. 209), after the Commission had already concluded that there was no connection between iron ore and scrap iron in terms of freight rates and that freight rates had no material impact on decisions affecting the removal of wrecked automobiles and other scrap metals. At that time, it was estimated that the difference between the 15-percent increase proposed and the 11 percent granted cost the Eastern railroads better than $2 million annually, approximately $1 million of which was "contributed" by Penn Central.

Similar contentions that an increase in freight rates will dry up the movement of a recyclable commodity with adverse effect on the environment may be raised by shippers of other waste commodities. However, the Freight Commodity Statistics show that the total volume in the STCC 40 category (Waste and Scrap Materials) increased by 57,553 carloads, or 7.29 percent, between 1968 and 1969, while total U.S. originations of all traffic during the same period increased by only 106,520 carloads, or 0.39 percent (FCS for Class I railroads, 1968 (Statement No. 69100–A) and corresponding statement for 1969). When the rail movement of these commodities increases over a period of years in the face of successive freight rate increases, it is obvious that the freight rate level has little to do with whether or not the commodity moves by rail or moves at all.

The Commission itself has noted that the existing rates on fly ash and other such commodities are on a relatively low level (332 I.C.C., 328; 339 I.C.C., 208–9); and the increase represented by the 2½-percent surcharge is minimal. For example, within the South, the increase would come to $8.75 on a carload of fly ash moving 400 miles,[2] $12 per carload on a 300-mile movement of nonferrous scrap,[3] $7 per carload on a 500-mile

[2] SFTB 2011–L, I.C.C. S–665, Item 6670–B, Supp. 148, CRC–706, Supp. 197.
[3] SFTB 2011–L, I.C.C. S–665, Item 68546–B, Supp. 170.

movement of textile waste,[4] and only $4.60 per carload on a 200-mile movement of scrap paper.[5]

My attention has been called to the opinion of the Court of Appeals for the Second Circuit in *The Port of New York Authority* v. *U.S.* (Dockets 71–1769, 71–1770, November 9, 1971) in which the Court recognizes the dangers of attempting to deal with the broad subject of environmental impact prematurely. Likewise, the Court recognized that the maintenance of status quo by over-cautious suspension can be as detrimental to the environment as allowing rate changes to take effect.

My statement reflects my own personal experience, the statements submitted here by other railroad executives, and the record made in previous Ex Parte proceedings. On this basis, I conclude that the proposed surcharge will have no environmental impact whatsoever.

VERIFICATION

STATE OF NEW YORK
County of New York, ss:

C. L. Smith, being duly sworn, deposes and says that he has read the foregoing statement and knows the contents thereof, and that the same are true as stated.

C. L. SMITH.

Subscribed and sworn to before me this 30th day of December, 1971.

JOSEPH LIEBSCHER,
Notary Public.

Term Expires March 30, 1973.

CERTIFICATE OF SERVICE

I hereby certify that copies of this statement were served upon each of the six regional offices of the Interstate Commerce Commission and that a copy has been served upon each party of record in Ex Parte Nos. 265–267, by depositing in the United States mail today copies properly addressed to each such person or office with first-class or air-mail postage prepaid

[4] SFTB 2011–L, I.C.C. S–665, Item 96090–C, Supp. 170.

[5] SFTB 2011–L, I.C.C. S–665, Item 75660–A, Supp. 182. All rates increased through Ex Parte 267–B.

in accordance with Rule 22 of the General Rules of Practice. I further certify that a copy of said document has been mailed to the Price Commission this day. A copy thereof will be supplied to any other person upon request addressed to Edward A. Kaier, Room 527, American Railroads Building, 1920 L Street NW., Washington, D.C. 20036.

Dated at Washington, D.C. this 31st day of December 1971.

EDWARD A. KAIER,
One of the Attorneys for
Railroad Petitioners.

Verified Statement No. 195
Affiant: A. Paul Funkhouser

Before the

INTERSTATE COMMERCE COMMISSION

EX PARTE No. 281
INCREASED FREIGHT RATES AND CHARGES, 1972

Verified Statement of

A. Paul Funkhouser
Senior Vice President-Sales and Marketing
Penn Central Transportation Company

February 27, 1972

My name is A. Paul Funkhouser. I am Senior Vice President-Sales and Marketing of Penn Central Transportation Company. I executed a verified statement in this case in support of the railroads' petition for a 2½% surcharge on freight rates and charges, which verified statement was filed with the Interstate Commerce Commission on December 15, 1971.

The railroad industry's decision to progress at 2½% emergency surcharge, which was made subject to some exemptions, was a temporary rate proposal. The increased costs which the railroads had incurred since the Ex Parte 267 increase made it necessary that the railroads seek an interim increase for application while fuller consideration was given to the amount of increase which could be applied to the traffic without causing diversion. In connection with the 2½% increase, serious consideration was given to the effect of the increase on the movement of traffic, and it was for this reason that the Eastern railroads exempted rates

on piggyback traffic and rates on manufactured iron and steel articles from that increase.

In my prior testimony in this case, I estimated that if the 2½% surcharge was authorized Penn Central would realize increased revenues of approximately $30 million annually. On review it appears that the annual yield from the surcharge which became effective February 5, 1972, will be approximately $33 million. That yield from the 2½% surcharge is an approximately 2.1% increase for Penn Central.

The proposed selective increases range from zero to 10%. For Penn Central, the selective increase is expected to produce an increase in freight revenues of approximately $32 million annually over the revenue yield from the 2½% surcharge and will reflect an average increase in revenue of approximately 4.1% over the level of freight rates applicable on February 4, 1972, and an increase of approximately 2% over the level of freight rates that became effective February 5, 1972.

The total Ex Parte 281 increase for Penn Central will approximate $65 million annually. This increase is far short of the increased costs incurred by Penn Central since the Ex Parte 267 general increase case. The October-November, 1971 increase in wage costs for Penn Central on an annual basis is approximately $44 million. On April 1, 1972, further wage increases will be made, pursuant to agreements with our employees, which will amount to approximately $46.8 million on an annual basis. Considering those two items of cost, which total $90.8 million on an annual basis, and which do not include all wage increases and do not include increased fringe benefit costs and payroll taxes, it is obvious that the proposed increase is far short of Penn Central's increased costs and is urgently needed. In this connection, Penn Central incurred in 1971 a deficit of approximately $275 million on a fully accrued basis. Obviously it is also important that we experience no time lag between the April 1, 1972 wage increase and the effective date of the selective increase.

The single most important consideration in arriving at the increase was its effect on the movement of traffic. The proposal reflects the consensus of the railroad traffic executives operating through the rate associations. While I, of course, cannot explain all of the reasons for assigning

an increase to each of the movements subject to the selective proposal, I did attend some of the meetings at which the proposal was discussed and participated in the decisions. I will now discuss some of Penn Central's major movements.

Penn Central Transportation Company transports more coal than any other railroad. Coal represents better than 30% of the total Penn Central freight traffic, yet the revenue from this important segment of our traffic approximates only 13% of our total freight revenue. With the per ton holddowns being proposed, the increase on coal traffic will be less than 4%. This is a reasonable assessment on receivers of this commodity. It is of great importance to Penn Central, as it will produce nearly $10 million in revenue for Penn Central on an annual basis. In my opinion,, the increase will not restrict Penn Central's coal business.

Another commodity of major importance to Penn Central Transportation Company is iron ore. That commodity represents approximately 8.5% of the tonnage carried by Penn Central and approximately 3.5% of Penn Central's freight revenues. The increase proposed will produce additional revenue to Penn Central of $2.3 million. This is less than a 4% increase because of the imposition of a 22¢-per-gross-ton holddown. The demand for iron ore is fixed primarily by the rate of production of the steel industry. It will not be affected by the freight rate change proposed here.

Coal and iron ore rates apply on almost 40% of the tonnage hauled by Penn Central. The increases on those commodities will produce approximately $12.3 million annually or approximately 19% of the estimated $65 million the selective increase will provide.

I previously mentioned two major movements within the East which were exempted from the 2½% surcharge which became effective on February 5, 1972. Those classes of traffic also are not subject to the selective increase. Trailer-on-flat-car traffic is directly competitive with motor carriers and with private carriage. After the Ex Parte 267 increase became effective, we found that large movements of traffic were being diverted to either private or common motor carriers. Consistent with our practice of making adjustments to meet competition, many rate reductions were

made. Because of the importance of preserving and increasing this class of traffic, we concluded not to increase TOFC rates at this time. Another important class of traffic which was exempted from the surcharge and also is not subject to an increase under the railroads' selective proposal is traffic which moves on the mileage scales applicable on manufactured iron and steel within Eastern Territory. After a study of this traffic, the Eastern railroads decided to publish a reduced level of truck competitive rates effective January 8, 1972. Those rates were protested by a number of motor carrier associations but were not suspended by the Commission. We consider it inadvisable to increase those recently-established rates at this time.

Necessarily the making of freight rates involves the exercise of practical judgment. Here the railroads are seeking to increase their revenues without losing business. I am of the opinion, insofar as the traffic of Penn Central is concerned, that the selective increase will accomplish that objective. In my opinion, the proposed increases will not adversely affect the movement of traffic and, on consideration of the cost increases experienced by the railroads, are not unreasonable.

Commonwealth of Pennsylvania :

SS

County of Philadelphia :

A. Paul Funkhouser, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

/s/ A. Paul Funkhouser
A. Paul Funkhouser

Subscribed and sworn to
before me this 23rd day
of February, 1972.

/s/ John C. Vemuth
John C. Vemuth
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires July 21, 1975

Verified Statement No. 202
Affiant: G. J. Robinson

Before the

INTERSTATE COMMERCE COMMISSION

EX PARTE No. 281
INCREASED FREIGHT RATES AND CHARGES, 1972

IN SUPPORT OF RAILROADS' PETITION
FOR SELECTIVE INCREASES IN
FREIGHT RATES AND CHARGES

Verified Statement of

G. J. Robinson
Vice-Chairman
Traffic Executive Association-Eastern Railroads

February 27, 1972

My name is G. J. Robinson. I am Vice-Chairman, Traffic Executive Association-Eastern Railroads, located at Two Pennsylvania Plaza, New York, N.Y. 10001. I have been engaged in traffic and transportation work for more than 23 years with the Traffic Executive Association-Eastern Railroads.

In Verified Statement No. 37, submitted on January 3, 1972, Mr. Charles L. Smith, Chairman, Traffic Executive Association-Eastern Railroads, expressed the opinion that the 2½ percent surcharge would have no adverse effect upon the environment. In the course of that statement, Mr. Smith noted that the railroads were in dire need of additional revenues (five major Eastern lines being in reorganization) and pointed to the inevitable deterioration

in railroad service should relief be denied or unduly delayed. He further alluded to the fact that the railroads had already made a substantial "contribution" to the environmental effort by reason of the holddowns imposed by the Commission in Ex Parte No. 267, even though the Commission had otherwise concluded, on the basis of the evidence there submitted, that the proposed increase would have no effect on the gathering and processing of scrap materials.

Subsequently, I had the opportunity to review certain of the material submitted by protestants in which it was suggested that the proposed surcharge would retard the movement of materials such as scrap iron and thereby inhibit those efforts. In my Reply Verified Statement No. 17, I pointed out that on the basis of all available factual information, I could only conclude that there was no relationship between existing freight rate levels and the movement and consumption of scrap iron, nor would the proposed 2½ percent surcharge result in any change in the situation. On the basis of its order entered February 1, 1972, it would appear that the Commission agrees.

It seems inevitable, however, that the same contentions will be raised again in this phase of the proceeding, and, in this statement, I shall set forth certain facts, which, in my opinion, make it clear that there is no connection between freight rates and the consumption of iron and steel scrap and non-ferrous scrap.

Iron and Steel Scrap

The supplementary protest filed on January 20, 1972, by the Institute of Scrap Iron & Steel, Inc. (P-39A), is notably lacking in factual data. It begins with some broad criticisms of Mr. Smith's qualifications as an environmental witness (V.S. 37), complains of the "impropriety" of levying "disproportionate" increases on scrap vis-a-vis iron ore, repeats the old refrain that scrap iron is at a disadvantage with iron ore, and concludes with the request that any increase on scrap iron be limited to the increases granted on "iron ore in its many forms" in terms of comparable metallic content. All this is set forth in the purest of generalities.

In the first place, neither Mr. Smith nor I represent ourselves as experts in the overall field of human environment. Those in opposition, however, inject the matter of environ-

mental impact in terms of the effect which railroad rates may have upon the movement of recyclable scrap materials, i.e., it is suggested that any increase in freight rates will retard the movement of these commodities *per se* or will discourage such traffic in favor of raw or virgin materials. In this context, the answer lies in the realm of freight rates, an area in which both Mr. Smith and myself have had extensive experience.

If, in fact, the level of freight rates or any given increase had slowed the movement of scrap iron or had eliminated scrap iron from the steelmaking process in favor of iron ore, that result would have been apparent by now. Inflation has forced the railroads to a succession of rate increases beginning in late 1967, and if these increases were disproportionate and/or discriminatory as applied to scrap iron, the result should have been a steady decline in the movement of recyclable scrap and a steady decline in price, the latter so as to remain "competitive" with iron ore. This result, however, has not obtained.

Instead, scrap iron prices show both ups and downs since 1967, varying from month-to-month, and, in the intervening years, scrap iron has actually improved its position in the steel-making process vis-a-vis iron ore. Appendix A attached hereto shows the relevant statistics as to consumption of scrap iron in steelmaking. Several comments are in order. Between 1957 and 1969, scrap iron actually increased its consumption, in terms of steel ingots produced, from 65.3 percent to 67.2 percent. The source of these data, of course, is the Institute's own publication, "Facts." There was also an increase in scrap consumption between 1967 and 1969 in the face of the increases granted in Ex Parte Nos. 256, 259 and 262. Viewed in its entirety, Appendix A shows that scrap consumption rises and falls with steel production.

In Appendix B attached hereto, I have set forth a table of composite prices for scrap iron, pig iron and iron ore for the years 1957-1970. The statistics are taken from recognized industry sources. During this entire period, prices of pig iron and iron ore remained relatively stable, but the price of scrap fluctuated from a low of $24.94 per ton to a high of $47.10 per ton.

More to the point, the price of No. 1 Heavy Melting Scrap rose from $27.63 to $44.95 per ton in the last four-year

period shown, when successive freight rate increases were being applied, and recent weekly issues of *Iron Age* quote per ton prices on No. 1 Heavy Melting Scrap at Pittsburgh as follows:

Issue	Price
10/21/71	$34-$35
11/18/71	33- 34
12/16/71	31- 32
1/13/72	35- 36
2/17/72	37- 38

Thus, without any change in freight rates, the price declined between October and December. It came back in January and rose still further in February, *after* the 2½ percent surcharge went into effect. The only possible conclusion must be that the movement and price of scrap iron has not been impeded, either by the going level of freight rates or by the increases authorized in recent years.

Upon several occasions in the past, the Institute itself has contended that scrap iron in fact competes with pig iron. In Appendix C to my Reply Verified Statement No. 17 (1/28/72), I set forth a table comparing the effect of the 2½ percent surcharge on the average freight rate on scrap iron with the effect on the average freight rates assessed against the materials necessary for the production of pig iron. Whereas the average increase on scrap iron came to only 14¢ per gross ton, the composite increase on pig iron components came to 28.7 cents per gross ton. If anything, a percentage increase enhances scrap iron's position vis-a-vis its competition, and the disparity between the two will widen even further under the selective proposals here.

The Commission itself concluded in Ex Parte No. 267 that there was no discernible relationship between freight rates and the removal from the public eye of such as abandoned automobiles. Nor is there here. On a rule-of-thumb basis, an abandoned automobile will provide 1½ tons of ferrous scrap; refrigerators and the like will provide substantially less. In the former case, an increase of 4 percent would mean about 34 cents per ton in the total cost of gathering and selling scrap. This is infinitesimal viewed in the context of a commodity whose prices very month-to-month in terms of dollars and by as much as $15 per ton from one year to the next.

From all of this factual data, much of which was, at one

time or another, provided by the Institute itself, the only possible conclusion is that the 4 percent increase proposed will have no effect on the gathering, movement or consumption of recyclable scrap.

Non-Ferrous Metal and Alloy Scraps

In an effort to capitalize on the recent national emphasis on recycling of waste materials, processors and brokers of non-ferrous scrap materials have contended that these commodities are basically low valued and that increases in railroad freight rates may well affect the *economic* gathering and processing of such materials. I emphasize "economic" in that some have suggested they would curtail the pursuit of ecology if it proves unprofitable.

As shown in my Appendix C, however, these commodities are of considerable value, ranging from 1 cent to 115 cents per pound, or from $20 to $2,300 per ton, and most of these items have experienced substantial increases in value over the past eight years.

During that same period, however, there has been virtually no effective increase in that portion of the processor's expense which is represented by rail freight rates. This result obtains because of the railroad industry's publication of incentive rates on these commodities. In my Appendix D, I have set forth the 40,000 and 80,000 pound rates which obtained in early 1963. I have also shown the 40,000, 60,000 and 80,000 pound incentive rates which became effective in later 1963, as well as the 100,000 and 120,000 pound rates which were established on December 10, 1969.

On a movement of 500 miles, for example, an 80,000 pound shipment in early 1963 would be assessed a rate of 68 cents per hundredweight. By increasing the minimum weight of the shipment to 120,000 pounds today, the processor would pay a rate of only 65 cents per hundredweight, including all increases through Ex Parte No. 267-B. The 4 percent increase here proposed would bring today's effective rate to 68 cents per hundredweight, precisely what was being paid over eight years ago. It is a rare segment of the nation's economy which has that privilege available, and, considering both the value of these commodities and the size of the price increases registered over the past eight years, I must conclude that an increase of 3 cents per hundredweight in the freight rate will have no effect upon the rail movement and no environmental impact whatsoever.

VERIFICATION

DISTRICT OF COLUMBIA
CITY OF WASHINGTON } ss:

G. J. Robinson, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

/s/ G. J. Robinson
G. J. ROBINSON

Subscribed and sworn to
before me this 25th
day of February 1972:

/s/ Ellen M. Herlihy
ELLEN M. HERLIHY

Notary Public of the
District of Columbia.
My Commission expires
February 29, 1972.

PERCENT IRON ORE, PIG IRON AND SCRAP CONSUMPTION IS OF STEEL INGOTS

(In Thousands of Net Tons)

		DOMESTIC PRODUCTION				TOTAL	
Year	STEEL INGOTS	IRON ORE	%	PIG IRON	%	SCRAP CONSUMPTION	%
1957	112715	115314	102.3	80798	71.7	73549	65.3
1958	84310	76101	90.3	58808	69.8	56360	66.8
1959	93446	67509	72.2	62178	66.5	66062	70.7
1960	99281	99438	100.2	68566	69.1	66469	67.0
1961	98015	79888	81.5	66565	67.9	64327	65.6
1962	98328	80448	81.8	67595	68.7	66160	67.3
1963	109261	82330	75.4	73715	67.5	74621	68.3
1964	127075	95016	74.8	87800	69.1	84626	66.6
1965	131185	97932	74.7	88944	67.8	90359	68.9
1966	134072	100965	75.3	92157	68.7	91583	68.3
1967	127213	94280	74.1	87371	68.7	85361	67.1
1968	131098	96168	73.4	89890	68.6	87060	66.4
1969	141069	99950	70.9	93502	66.3	94816	67.2

SOURCE: "FACTS" issued by Institute of Scrap Iron and Steel, Inc., page 34, 31st Edition Yearbook 1970.

Appendix B

PRICES OF IRON AND STEEL
NO. 1 HEAVY MELTING SCRAP,
IRON ORES, AND PIG IRON

	(1) No. 1 Heavy Melting	(1) Pig Iron	(2) Mesabi Bessemer Iron Ore	(2) Mesabi Non-Bessemer Iron Ore
		(in dollars per ton of 2,240 pounds)		
1957	47.10	63.82	11.60	11.45
1958	37.81	65.95	11.60	11.45
1959	37.69	65.95	11.60	11.45
1960	33.20	65.95	11.60	11.45
1961	36.37	65.95	11.60	11.45
1962	28.34	65.46	10.80	10.65
1963	26.89	62.87	10.80	10.65
1964	36.50	62.75	10.70	10.55
1965	34.27	62.75	10.70	10.55
1966	30.66	62.75	10.70	10.55
1967	27.63	62.70	10.70	10.55
1968	25.94	62.70	10.70	10.55
1969	30.56	63.78	10.70	10.55
1970	44.95	69.33	10.95(1)*	10.80 (1)*

(1) - Metal Statistics, composite price

(2) - Iron Age, Lake Superior ores (51.5% Fe Natural) delivered lower lake ports.

* - Effective January 1, 1970

NON-FERROUS METAL SCRAPS
NEW YORK DEALERS BUYING PRICES IN WHOLESALE LOTS
(CENTS PER POUND)

	Col. 1 February 1963	Col. 2 December 1971	Col. 3 Increase or Decrease %
No. 1 Heavy Copper and Wire	24 - 24½	33 - 34	+38.8
No. 2 Heavy Copper and Wire	22 - 22½	29 - 30	+33.3
Light Copper	19-3/4-20¼	27 - 28	+38.3
No. 1 Composition	20¼- 20 3/4	29 - 30	+44.6
Brass Pipe	16 - 16½	19 - 20	+21.2
Auto Radiators (unsweated)	15¼ - 15 3/4	21 - 22	+39.7
Cocks and Faucets	16½ - 17	20 - 21	+23.5
Heavy Yellow Brass	14¼ - 14½	18 - 19	+31.0
Soft Scrap Lead	6 - 6½	4 - 4½	-30.8
Battery Lead Plate	2 - 2½	-- - 1	-60.0
Clean Hand Picked type shells	5½ - 6	6 - 6½	+ 8.3
Old Zinc	3 - 3¼	3 - 3¼	0
New Die Cast Scrap	2 3/4 - 3¼	3 - 3½	+ 7.7
New Zinc Clipping	5 - 5¼	6 - 6½	+23.8
Old Die Cast Scrap	1 3/4 - 2	2 - 2¼	+12.5
Block Tin Pipe	80 - 85	110 - 115	+35.3
No. 1 Pewter	-- -40	72 - 75	+25.0
No. 1 Babbit (High Grade)	-- -40	-- - --	-
Solder Joints	12 - 12½	-- - --	-
Pure Nickel Clips	53 - 54	70 - 75	+38.9
Rolled Nickel Anodes	55 - 56	75 - 85	+51.8
Nickel Rod Ends	53 - 54	75 - 85	+57.4
Nickel Turnings	40 - 41	55 - 60	+46.3
New Monel Rods	25 - 26	45 - 50	+92.3
New Monel Clips	25 - 26	48 - 53	+103.8
Monel Cast	20 - 21	42 - 48	+128.6
2S Aluminum Clippings	9 3/4-10¼	7½ - 8	-23.8
Old Aluminum Sheet	7 - 7½	5½ - 6	-20.0
Monel Sheet	23 - 26	42 - 48	+84.6
Brass Rod Ends	-- - --	25 - 26	-

NON-FERROUS METAL SCRAPS
PITTSBURGH DEALERS BUYING PRICES IN WHOLESALE LOTS
(CENTS PER POUND)

	Col. 1 February 1963	Col. 2 December 1971	Col. 3 Increase or Decrease %
No. 1 Heavy Copper and Wire	22 3/4 - 23	38 - 39	+69.6
No. 2 Heavy Copper and Wire	21 - 21½	32 - 33	+55.3
Light Copper	19 - 19½	29 - 30	+55.8
No. 1 Composition	20½ - 20 3/4	30 - 31	+49.4
No. 1 Composition Turnings	20 - 20½	-- - --	-
Auto Radiators	15 - 15½	23 - 24	+57.4
Yellow Brass	13 -- 13½	19 - 20	+50.9
New Brass Clippings	17 3/4 - 18	24 - 25	+38.9
No. 1 Brass Rod Turnings	14½ - 14 3/4	22 - 23	+55.9
Aluminum Castings	7½ - 8	5½ - 6½	-18.7
Aluminum Borings and Turnings	5½ - 5½	4 - 5	- 9.1
Old Zinc	3 - 3½	4 - 5	+53.8
New Zinc Clippings	5½ - 5½	8 - 8½	+54.5
New Die Cast Scrap	3½ - 4	3 - 3½	-12.5
Type Metal	7½ - 7 3/4	9 - 10	+32.1
Soft Scrap Lead	6½ - 6 3/4	7½ - 8	+18.5
Battery Lead Plates	-- - 2	2 - 2½	+12.5
Monel Metal	23 - 24	43 - 47	+95.8
Cocks and Faucets	-- - --	22 - 23	-
New Brass Clippings	-- - --	24 - 25	-
Mixed Aluminum Clips	-- - --	8 - 9	-

SOURCE: Secondary Raw Materials - Publication of the Waste Trade Industry.

APPENDIX D

NON-FERROUS METAL SCRAPS

MILES	(2) 40,000 Pounds	(2) 80,000 Pounds	(1) 40,000 Pounds	(1) 60,000 Pounds	(1) 80,000 Pounds	(1) 100,000 Pounds	(1) 120,000 Pounds
	A	A	B	B	B	B	B
100	41½	33½	51	46	42	39	34
200	50½	43½	65	60	56	50	43
300	61½	50½	78	71	64	61	51
400	69	60½	87	82	75	68	61
500	79	68	101	94	83	77	65
600	90	75	112	102	92	84	72
700	96	81	123	112	101	94	81
800	104	90	133	122	111	101	87
900	111	95	141	130	119	107	94
1000	119	99	151	138	124	115	99
1100	125	105	159	145	132	122	103
1200	132	111	168	153	139	129	111
1300	141	116	175	160	145	134	117
1400	145	124	183	168	152	141	122
1500	152	130	192	175	160	149	127
1600	161	135	201	183	165	153	132
1700	167	141	209	191	173	160	138
1800	195	145	216	200	181	165	144

(1) Authority: TL-CTR Tariff E-2009-H, I.C.C. C-733.
(2) Authority: Trunk-Line E-180, I.C.C. A-1059.

A - Including Ex Parte 223-A increases.
B - Including Ex Parte 267-B increases.

Verified Statement No. 203
Affiant: R. D. Zuest

Before the

INTERSTATE COMMERCE COMMISSION

EX PARTE NO. 281
INCREASED FREIGHT RATES AND CHARGES, 1972

IN SUPPORT OF RAILROADS' PETITION
FOR SELECTIVE INCREASES IN
FREIGHT RATES AND CHARGES

Verified Statement of

R. D. Zuest
Member, Standing Rate Committee
Transcontinental Freight Bureau
Western Railroad Traffic Association

February 27, 1972

My name is R. D. Zuest. I have been engaged in railroad traffic work since 1948 and since September, 1966 have served in my present position as a member of the Standing Rate Committee, Transcontinental Freight Bureau, Western Railroad Traffic Association, with offices at 222 South Riverside Plaza, Chicago, Illinois 60606.

The railroads are proposing a 4% increase on petroleum refinery waste and waste sulphide except on movements to or within Southern Freight Association Territory where a 3% increase will apply. Those increases should not have any effect on the collection and disposal of petroleum refinery waste and hence no impact on the environment.

The rates on petroleum refinery waste which moves from refineries to processing plants are presently at a very low

level. So are the rates on waste sulphide, produced by the processing plants and sold to the paper industry and others for use in commercial processes. The present rate on petroleum refinery waste from Sugar Creek, Missouri to Houston, Texas is 46 cents per cwt. This is 8.2% of the Docket 28,300 first-class rate and compares with a present rate of 62 cents per cwt. on Residual Fuel Oil, another refinery by-product, moving from the same origin to Houston. The present rate of 38 cents per cwt. on petroleum refinery waste from Tulsa, Oklahoma to Houston reflects 8.3% of the first-class rate and compares with a present rate of 50 cents per cwt. on Residual Fuel Oil from Tulsa to Houston. The proposed increase on Residual Fuel Oil is 6%. The low level of rates on petroleum refinery waste is due to the fact that the railroads have responded favorable to requests from collectors and processors of petroleum refinery wastes for reductions in transportation charges on these products.

The major processor of refinery waste on the Gulf Coast is the Merichem Company at Houston, Texas. In the past, Merichem has protested the railroad general rate increases. In such protests, Merichem has urged the Commission that the increases would cause Merichem to reduce its operations and perhaps go out of business. Evidence available establishes the contrary. In Verified Statement No. 133 filed in Ex Parte No. 281, Witness Lohman showed that in 1971, Merichem received just over 100,000,000 lbs. of petroleum wastes by rail from numerous refineries. In Verified Statement No. 214 filed May 1, 1970 in Ex Parte No. 265 by Witness Lohman, showed that only 97,304,784 lbs. of petroleum refinery wastes moved in 1969 by rail to Merichem's plant at Houston. Obviously, there has been an increase in the inbound movement of petroleum refinery waste, and rate increases which have taken effect between 1969 and 1971 have not impaired the ability of Merichem to collect these wastes and market the end product.

Witness Lohman's Statement, VS-133, page 23, also shows that in 1971 Merichem processed 550 million lbs. of waste. At 7½ lbs, per gallon, this equals 73 million gallons for the year.[1] The statement also shows that the Houston plant has a capacity of only 50 million gallons annually.

[1] At page 3 of VS-133, Witness Lohman states that 7900 tons equals 50,000 barrels. At 42 gals/bbl, this equals 7½ lbs/gal.

These figures indicate that the Houston plant is operating at more than its rated capacity and, again, any increases in railroad freight rates have not adversely affected Merichem's handling of petroleum refinery wastes.

The proposed increases will have an extremely small effect on Merichem's transportation costs. Petroleum refinery waste moving from Sugar Creek, Missouri to Houston, Texas now takes a rate of 46 cents per hundredweight at a minimum weight of 180,000 lbs. for a per car charge of $828.00. The 2½% emergency surcharge resulted in an increase of $20.70 per car. When the proposed 4% increase is applied to the rate at the Ex Parte 267-B level, there will result a rate of 48 cents per hundredweight for a per car revenue of $864.00. This is a net increase of $15.30 per car over charges now in effect or $36.00 over the X-267-B level. The net increase would be less than 1 cent per hundredweight over the charges now in effect. On outbound movements of waste sulphide from the Merichem plant at Houston to New Orleans, the X-267-B rate is 24 cents per hundredweight at minimum weight of, 180,000 lbs. or $432.00 per car. The 2½% emergency surcharge resulted in an increase of $10.80 per car. The proposed increase results in only an additional $7.20 per car. The total increase over the X-267-B level would be only $18.00 per car.

The past general increases have not interfered with the collection of petroleum refinery waste nor with the distribution of the recycled product. The proposed increase will not cause any change in the present handling of the petroleum waste products or the recycled end product. The proposed increase will not have any adverse impact on the environment. If railroad service is necessary to the movement of waste products, additional revenues must be available to sustain that service. The modest increase proposed represents a fair and reasonable participation of the petroleum waste processors in defraying increased costs experienced by the railroads.

VERIFICATION

STATE OF ILLINOIS
COUNTY OF COOK } SS:

R. D. Zuest, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

/s/ R. D. Zuest

Subscribed and Sworn to
before me this 23rd
day of February, 1972.

Margaret H. Nelson
Notary Public

My Commission Expires December 30, 1973

Verified Statement No. 204
Affiant: A. C. Sullivan

Before the

INTERSTATE COMMERCE COMMISSION

EX PARTE NO. 281
INCREASED FREIGHT RATES AND CHARGES, 1972

IN SUPPORT OF RAILROADS' PETITION
FOR SELECTIVE INCREASES IN
FREIGHT RATES AND CHARGES

Verified Statement of

A. C. Sullivan
Member, Standing Rate Committee
Western Trunk Line Committee

February 27, 1972

My name is A. C. Sullivan. I am a member of the Standing Rate Committee, Western Trunk Line Committee, Room 1218, 222 South Riverside Plaza, Chicago, Illinois 60606. I have had more than twenty years' experience in the handling of railroad freight traffic matters and have participated and testified in numerous proceedings before the Interstate Commerce Commission, including several Ex Parte general rate increase proceedings.

The rail carriers are seeking a 6 percent increase on rates for the movement of fly ash from, to or within all territories. This increase will have no effect on the movement of this product and will have no adverse impact on the environment. In the past, protests have been filed with respect to some increases applying on fly ash. The main

thrust of such protests has been that fly ash would be displaced by competitive natural pozzolans in the construction of dams if freight rates were increased. It is my understanding that some contracting authorities for dams built at government expense have in the past used fly ash exclusively. It is significant that fly ash has continued to move in substantial quantities to dam projects and for use in oil well cement, even though there have been increases in freight rates.

It is also my understanding that construction of an extension to a large dam in the West has recently commenced using fly ash, and that fly ash will continue to move to this dam site at least until 1982. An investigation discloses that substantial volumes of fly ash continue to move not only to dam sites but to other points for use in oil well cement.

The rates on fly ash have been at a low level in the past, and the proposed rates are at a proportionately low level. The proposed increase will result in rates which are less than 9.5 percent of the Class 100 rates in most mileage brackets in ICC Docket 28300 territory:

Miles	Proposed Rate (Cents per cwt)	Proposed Class 100 (Cents per cwt)	Percentage of Class 100
300	34	369	9.2
500	45	475	9.5
1,000	64	709	9.0
1,500	82	914	9.0
2,000	100	1,118	8.9
2,300	112	1,242	9.0

It is apparent that the proposed rates remain at an extremely low level. Shippers and receivers of fly ash should bear a fair share of the increased costs which the railroads must pay if the service is to continue. Fly ash is usually moved in expensive covered hopper cars. If moved in open top cars there would be a tendency for the commodity to blow out of the cars and pollute the atmosphere. The railroads can only continue to keep covered hopper cars in the service of moving fly ash if the rates provide economic justification.

VERIFICATION

STATE OF ILLINOIS
COUNTY OF COOK } SS.

A. C. Sullivan, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

(Signed) A. C. Sullivan

Subscribed and sworn to
before me this 23rd day
of February, 1972

Margaret H. Nelson
Notary Public

My Commission Expires December 30, 1973

Verified Statement No. 205
Affiant: Ralph O. Foster

Before the

INTERSTATE COMMERCE COMMISSION

EX PARTE No. 281
INCREASED FREIGHT RATES AND CHARGES, 1972

IN SUPPORT OF RAILROADS' PETITION
FOR SELECTIVE INCREASES IN
FREIGHT RATES AND CHARGES

Verified Statement of

RALPH O. FOSTER
Senior Market Analyst
Market Research Section
Southern Railway System
Washington, D.C. 20013

February 27, 1972

My name is Ralph O. Foster, and I am Senior Market Analyst, Market Research Section, Southern Railway System, Washington, D.C. My primary responsibility is to make continuing studies of the pulp, paper, and allied industries, the available traffic moving to and from those industries, and the rail participation in that traffic. I participate in and evaluate market studies leading to recommendations of rate actions on commodities produced by and used by these industries. I have been connected with Southern for seven years and have been responsible for these industries for three years.

The permanent increase proposed in connection with scrap paper is 8% on rates having minimum weights less than 80,000 pounds and 3% on rates having minimum weight of 80,000 pounds or more. The 3% increase on rates with minimum weights of 80,000 pounds or more, is proposed in order to encourage increased use of the heavier loading rates.

Southern's average load of scrap paper shipments in 1971, and I believe our experience to be typical, was 40.8 tons per car. Over 60% of the scrap paper movements over our railroad are on the 80,000 pound rates which are extremely low.

Over the years 1967 to the present time, during which there were several general increases in rates, the movement of scrap paper by rail has been steadily increasing and continues to do so. In 1971 Southern transported approximately 100,000 tons more of scrap paper than it did in 1967. We handled 430,000 tons in 1967, and approximately 530,000 tons in 1971. During that time there was an increase in the tonnage each and every year. The volume of scrap paper handled by other major Southern District roads shows a similar trend. In 1967, L&N, IC, and SCL handled 789,000 tons of scrap paper, and that had increased to 1,127,000 tons in 1971. These figures are available to us because we have an information exchange agreement with the other major Southern District railroads. Similar current figures are not available nationally, but the commodity statistics reports filed with the ICC indicate that the movement of scrap paper has also grown in the nation as a whole between the years of 1967 and 1970 from 7,243,289 tons to 8,064,428 tons.

Scrap paper is subject to the 2½% interim surcharge at the present time and the heavy loading movements, which constitute over 60% of Southern Railway's shipments, will be subject only to a 3% increase under the permanent proposal. In my opinion, the percentage of shipments loaded on 80,000 pound rates or more will continue to increase.

The permanent increases proposed here on scrap paper will not adversely affect the movement by rail. Scrap paper will still retain a significant rate advantage over woodpulp. It will also retain a significant rate advantage over pulp-

wood because it takes about 2 tons of pulpwood to make one ton of woodpulp, while scrap paper is converted on almost a 1-to-1 ratio. Therefore, we do not expect the proposed increases to inhibit the movement of scrap paper in any way; on the contrary, we expect a continued growth in the movement of that traffic by rail.

VERIFICATION

STATE OF ILLINOIS
COUNTY OF COOK } SS:

R. D. Zuest, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

(Signed) R. D. Zuest

Subscribed and Sworn to
before me this 23rd day
of February, 1972.

Margaret H. Nelson
Notary Public

My Commission Expires December 30, 1973

Verified Statement No. 206
Affiant: J. J. Warfield

Before the
INTERSTATE COMMERCE COMMISSION

EX PARTE No. 281
INCREASED FREIGHT RATES AND CHARGES, 1972

IN SUPPORT OF RAILROADS' PETITION
FOR SELECTIVE INCREASES IN
FREIGHT RATES AND CHARGES

Verified Statement of

J. J. WARFIELD
Market Analyst
Market Research Section
Southern Railway System
Washington, D.C. 20013

February 27, 1972

My name is J. J. Warfield, and I am Market Analyst, Market Research Section, Southern Railway System, Washington, D.C. My primary responsibility is to be continuously familiar with the traffic moving to and from the textiles, furniture, and automotive industries, and I am also responsible for freight, all kinds movements. I have had this responsibility for a year and a half, and prior to that, I had three years experience as a traffic analyst for the Frisco.

Textile wastes are primarily produced in the South (about ⅔ of the total U.S. production). Over the last few years fluctuations in the movement of textile wastes by rail in the South have generally followed textile produc-

tion. When the Ex Parte 281 permanent increase proposals were under study, I participated, with several others, in making a recommendation that no increase be applied to textile wastes moving from, to and within SFA Territory. For the shorter distances, this traffic is highly susceptible to motor common carrier and private trucking and we felt that this commodity could not competitively stand an increase in our service area at this time. Also, the value of the commodity is low and we were concerned that an increase from, to, and within Southern Freight Association Territory might in some manner inhibit certain movements.

While the proposal is to apply a 6% increase on textile wastes moving within and between territories other than SFA, this can have little significant impact on the movement of textile wastes as a whole. Although we have no firm figures on the production of textile wastes, normally the production of wastes would be directly related to the production of textiles, the South being the principal producing area.

In my opinion, therefore, the Ex Parte No. 281 proposal will have little or no effect on the total movement of textile wastes by rail.

VERIFICATION

DISTRICT OF COLUMBIA, SS:

J. J. WARFIELD, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

/s/ J. J. Warfield
J. J. WARFIELD

Subscribed and sworn to before me this 25th day of February, 1972.

/s/ Lawrence A. Huff
LAWRENCE A. HUFF
Notary Public in and for
the District of Columbia
My Commission expires June 30, 1972

[Railroads' Reply, Verified Statement No. 17, Affiant: G. J. Robinson]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 281, Increased Freight Rates and Charges, 1972

REPLY VERIFIED STATEMENT OF G. J. ROBINSON TO P–39 AND P–39A: INSTITUTE OF SCRAP IRON & STEEL INC.; P–52: STEEL WINDOW INSTITUTE; P–53: THE BOGART AND CARLOUGH COMPANY; P–54: RUSCO DIVISION/RUSCO INDUSTRIES, INC.

(Iron or Steel Scrap; metabuilding products)

January 28, 1972

My name is G. J. Robinson. I am Vice-Chairman, Traffic Executive Association-Eastern Railroads, Two Pennsylvania Plaza, New York, N.Y. 10001. I have been engaged in traffic and transportation work for over 23 years with the Traffic Executive Association-Eastern Railroads.

In its protest and supplemental protest (P–39, P–39A), the Institute of Scrap Iron and Steel Inc. (ISIS) contends that any increase on iron or steel scrap must be held down to the resulting increase on iron ore. This is the same tired contention which the Commission emphatically rejected on all counts in the Ex Parte 265–267 proceedings. It should therefore be sufficient here to review the Commission's comments on various phases of the dispute, update the record in certain particulars, and thus establish that there has been no significant change in circumstances which would warrant a different result.

In Increased Freight Rates, 1970 and 1971, 339 I.C.C., at page 205, the Commission stated that:

> Between 1961 and 1966, when there were no general freight rate increases, the price of scrap fluctuated between $24 and $39 per ton. The price of No. 1 heavy melting scrap increased from $27.64 per gross ton in 1967 to $43.50 in 1970, an increase of nearly 60% in spite of the increased freight rates during that same period. The prices of pig iron and iron ore advanced only slightly.

The Commission thereupon concluded that there was little, if any, correlation between rail freight rates and the market for iron and steel scrap and that rail freight rates on scrap had no material impact on the decisions which resulted in the removal of wrecked automobiles and other scrap metals pursuant to anti-pollution measures.

The ISIS protest here offers no additional facts. However, from my Appendix A, attached hereto, the wide fluctuation in scrap iron prices vis-a-vis the relatively stable picture displayed by iron ore and pig iron is self-evident and cannot possibly be related to freight rates. A 2½ percent increase in freight rates here would mean a difference in the average transportation cost of scrap iron of some 14 cents a gross ton and would have little, if any, effect on the use or delivered price of a commodity which varies by as much as 50 pecent from year to year.

It also seems pertinent to observe at this point that the consumption of scrap rises and falls with steel production. My Appendix B is a reproduction of a table appearing at page 34 of the publication "FACTS", issued by ISIS (31st edition, 1970). This table shows that increases or decreases in the domestic production of steel are reflected in increases and decreases in total scrap consumption. It also shows that between 1957 and 1969, scrap iron improved its standing as a steelmaking component vis-a-vis both iron ore and pig iron. Figures shown therein for a total scrap consumption, of course, include home scrap, but the overall trend in the use of scrap is obviously favorable. This is borne out by the comment of a consultant, appearing at page 92 of the same publication, thus:

> Between 1970 and 1980, I anticipate U.S. scrap consumption for steelmaking to move from 65 million to 85 million tons. Total scrap consumption during the decade will rise from 86 million to 112 million tons . . . we will

see during the coming 10 years a continuing but moderate rise in the price of steel scrap.

And this same consultant predicted an increase in the use of purchased scrap from 36 million tons to 45 million tons, between 1970 and 1980.

After hearing upon formal complaint in *Institute of Scrap Iron & Steel, Inc.* v. *Akron GYR*, 316 I.C.C. 55, the Commission decided that there was no justification from a transportation standpoint for requiring a rigid relationship between the rates on scrap iron and those on pig iron and iron ore. With respect to pig iron, the Commission noted in Ex Parte 265–267 that:

> The protestants concede that to produce 1 ton of pig iron requires 1½ tons of iron ore plus 1 ton of other materials. (p. 206).

And at page 207 of that decision, the Commission referred to the fact that whereas the increase there proposed would come to only 76 cents per gross ton on scrap iron, the combined increases on the materials utilized in the production of one ton of pig iron totaled $1.502. In my Appendix C, I have updated those figures so as to show the effect of the 2½ percent surcharge at the Ex Parte 267-B rate level. The increase on scrap iron comes to only 14 cents per ton versus a total of 28 cents per ton on the materials required for the production of one ton of pig iron.

Although the Commission concluded that there was no showing in Ex Parte 265–267 that the level of freight rates had anything to do with the removal of refuse, such as abandoned automobiles, it nevertheless decided that some allowance should be made for environmental considerations, particularly since the railroads therein were seeking to improve their net revenues as well as to cover their additional costs. In this proceeding, however, the additional revenues sought are insufficient to cover the increased costs incurred, and there is no room for any allowance. Nor should any be necessary, even as a matter of judgment. Assuming, for example, that an abandoned automobile will provide 1½ tons of ferrous scrap, the proposed 2½ percent increase, reflecting 14 cents per ton, would mean an overall increase of 21 cents per abandoned automobile. Again, when scrap iron prices fluctuate in terms of dollars per month, with or without change in the freight rates, it must be concluded that the proposed 2½ percent surcharge will have no

effect on the gathering of scrap. On the other hand, the proposed 2½ percent surcharge on scrap iron is a very vital part of the railroads' revenue program. As set forth in Appendix D, the 2½ percent surcharge would provide additional revenues in the amount of $1.95 million for the seven principal scrap-carrying Eastern lines, and over one-half of that amount would accrue to such as Penn Central and Reading Company, both of which are in reorganization.

The Steel Window Institute, The Bogert and Carlough Company and Rusco Division, Rusco Industries, Inc. (P–52, P–53, P–54) protest any increase with a holddown on building products made of wood unless similar treatment is accorded their metal products. These protests deal in generalities without any supporting data or information as to actual competition, movements affected, or territorial application.

VERIFICATION

DISTRICT OF COLUMBIA, *City of Washington, ss.*

G. J. Robinson, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

G. J. ROBINSON.

Subscribed and sworn to before me this 27th day of January, 1972:

ELLEN M. HERLIHY,
Notary Public of the District of Columbia.

My Commission expires February 29, 1972.

492-909—73——3

Appendix A

PRICES OF IRON AND STEEL, NO. 1 HEAVY MELTING SCRAP, IRON ORES, AND PIG IRON

	No. 1 heavy melting [1]	Pig iron [1]	Mesabi bessemer iron ores [2]	Mesabi nonbessemer iron ores [2]
	(in dollars per ton of 2,240 pounds)			
1957	47.10	63.82	11.60	11.45
1958	37.81	65.95	11.60	11.45
1959	37.60	65.95	11.60	11.45
1960	33.20	65.95	11.60	11.45
1961	36.37	65.95	11.60	11.45
1962	28.34	65.46	10.80	10.65
1963	26.89	62.87	10.80	10.65
1964	36.80	62.75	10.70	10.55
1965	34.27	62.75	10.70	10.55
1966	30.66	62.75	10.70	10.55
1967	27.43	62.70	10.70	10.55
1968	25.94	62.70	10.70	10.55
1969	30.56	63.78	10.70	10.55
1970	44.95	69.33	[3] 10.95	[3] 10.80

[1] *Metal Statistics*, composite price
[2] *Iron Age*, Lake Superior ores (51.5% Fe Natural) delivered lower lake ports.
[3] Effective January 1, 1970

Appendix B

PERCENT IRON ORE, PIG IRON AND SCRAP CONSUMPTION IS OF STEEL INGOTS

[In thousands of net tons]

Year	Domestic Production					Total scrap consumption	Percent
	Steel ingots	Iron ore	Percent	Pig iron	Percent		
1957	112,715	115,314	102.3	80,798	71.7	73,549	65.3
1958	84,310	76,101	90.3	58,808	69.8	56,360	66.8
1959	93,416	67,509	72.2	62,178	66.5	66,062	70.7
1960	99,281	99,433	100.2	68,506	69.1	66,469	67.0
1961	98,015	79,888	81.5	66,565	67.9	64,327	65.6
1962	98,328	80,448	81.8	67,505	68.7	66,160	67.3
1963	109,261	82,330	75.4	73,715	67.5	74,621	68.3
1964	127,075	95,016	74.8	87,800	69.1	84,626	66.6
1965	131,185	97,932	74.7	88,944	67.8	90,359	68.9
1966	134,072	100,965	75.3	92,157	68.7	91,583	68.3
1967	127,213	94,280	74.1	87,371	68.7	85,361	67.1
1968	131,098	96,168	73.4	89,890	68.6	87,060	66.4
1969	141,069	99,950	70.9	93,502	66.3	94,816	67.2

Source: "FACTS" issued by Institute of Scrap Iron and Steel, Inc., page 31, 31st Edition Yearbook 1970.

APPENDIX C

Effect of 2½% Increase on Materials Used In the Production of One Ton of Pig Iron versus One Ton of Scrap Iron or Steel

Increase on Iron Or Steel Scrap:	Composite increase
1.8 tons of Iron Ore (A)	16. 0¢
0.73 tons of Coke (A)	10. 0¢
0.22 tons of Limestone (A)	1. 9¢
0.056 tons of Scrap (A)	. 8¢
(A) 14¢ GT 1 ton of Scrap—Total Increase Per Gross Ton	28. 7¢

(A) Reflects increase based on average rate at Ex Parte 267-B level for movements within Official Territory. (SOURCE: ICC Statement TD-1 for year 1969 brought up to date)

APPENDIX D

SCRAP IRON HANDLINGS AND REVENUE FOR PRINCIPAL IRON AND STEEL RAIL CARRIERS

Railroad	October 1, 1970 to September 30, 1971		
	Carloads	Net tons	Total revenue
B. & O.	41,762	2,442,189	$14,004,920
B. & L.E.	3,205	189,013	428,804
C. & O.	21,213	1,263,880	8,168,738
EL	12,791	706,515	2,752,117
N. & W.	28,325	1,609,700	6,056,089
PC	182,492	10,273,052	43,228,210
RDG	22,182	1,305,058	3,870,413
Total	314,973	17,789,416	78,209,291

Source: Quarterly Commodity Statistics procured from individual roads named.

[*Railroads' Reply Verified Statement No. 24, Affiant: Robert E. Parrish*]

Before the INTERSTATE COMMERCE COMMISSION

Ex Part No. 281, Increased Freight Rates and Charges, 1972

REPLY VERIFIED STATEMENT OF ROBERT E. PARRISH TO VERIFIED STATEMENT NO. 98 AND PROTEST NO. 39 (V.S. 98) NATIONAL ASSOCIATION OF SECONDARY MATERIAL INDUSTRIES, INC.; (P. 39) INSTITUTE OF SCRAP IRON AND STEEL, INC.

(Non-ferrous Scrap, Waste Paper, Textile Waste, Rubber and Plastic Scrap, and Scrap Iron and Steel)

January 28, 1972

My name is Robert E. Parrish and I am currently employed by Burlington Northern Inc. as Manager of Commerce. My

office is at 176 East Fifth Street, St. Paul, Minnesota 55101. I have been employed for the past 36 consecutive years in the Freight Traffic Department of the Chicago, Burlington & Quincy Railroad Company and in the Pricing Division of the Marketing Department of Burlington Northern Inc. During this time my duties have required a knowledge of freight rates, tariffs, and matters related to freight transportation.

This statement is in reply to V.S.–98 filed by John C. Vaccaro on behalf of National Association of Secondary Materials, Inc., and P–39 filed by Howard Gould, David Reichert and Stephen D. Strauss on behalf of the Institute of Scrap Iron and Steel, Inc.

This reply statement is directed to the issue of environmental impact raised in V.S.–98 and P–39 and does not directly address itself to the specifics of any one of the recycled commodities.

Attached in Appendix A is a comparison of the originated tonnage of Class I railroads and Class I motor carriers reported for the years 1966 and 1969 under the two digit Standard Transportation Commodity Code No. 40 covering scrap and waste materials. The differences between the tonnages of 1969 over the 1966 tonnages are then totaled and each of the two components are cast into the percentages each reflects of the total of the increased tonnage 1969 over 1966.

Attention is directed to the increase in tonnage via railroads for the year 1969 compared to 1966 of 3,853,985 tons and the increase in tonnage via motor carriers for the year 1969 compared to 1966 of 403,975 tons. Of the total increased tonnage, 90.5 percent moved via rail and 9.5 percent via motor carrier.

VERIFICATION

DISTRICT OF COLUMBIA,
City of Washington, ss:

Robert E. Parrish, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

ROBERT E. PARRISH.

Subscribed and sworn to before me this 27th day of January,

ELLEN M. HERLIHY,
Notary Public of the District of Columbia.
My Commission expires February 29, 1972.

APPENDIX A

STCC 40 WASTE AND SCRAP MATERIALS

Via Class I Railroads in United States		Via Class I Motor Carriers in United States	
Year	Tons	Year	Tons
1966	37,993,809	1966	1,067,871
1969	41,847,794	1969	1,471,847
Increase in tons 1969 over 1966	3,853,985	Increase in tons 1969 over 1966	403,975

TOTAL INCREASE IN TONNAGE 1969 COMPARED TO 1966

	Tons	Percentage of total increase
Via Railroads	3,853,985	90.5
Via Motor Carriers	403,975	9.5
Total increase 1969 over 1966	4,257,960	100.0

Source—Railroads: Freight Commodity Statistics, Class I Railroads in the United States, for the years ending December 31, 1966 and December 31, 1969 published by the Bureau of Accounts, Interstate Commerce Commission.

Motor Carriers: Freight Commodity Statistics, Motor Carriers of Property, for years ending December 31, 1966, and December 31, 1969, published by the Bureau of Accounts, Interstate Commerce Commission.

[*Railroads' Reply Verified Statement No. 31, Affiants: William J. Bolch, Joseph M. Feldman, Charles A. Darrell*]

Before the INTERSTATE COMMERCE COMMISSION

Ex Parte No. 281, Increased Freight Rates and Charges, 1972

REPLY VERIFIED STATEMENT OF WILLIAM J. BOLCH, JOSEPH M. FELDMAN, CHARLES A. DARRELL TO VERIFIED STATEMENT NO. V.S. 98—NATIONAL ASSOCIATION OF SECONDARY MATERIALS INDUSTRIES, INC. PROTEST NO. P-185—FRANKEL BROTHERS CO., INC.

(Non-Ferrous Metal and Alloy Scraps, Rags, Textile Waste and Related Articles, Paper Waste and Scrap)

January 28, 1972

My name is William J. Bolch. I am Assistant Chairman of the General Freight Traffic Committee-Eastern Railroads, with

headquarters at Two Pennsylvania Plaza, New York, N.Y. 10001. I have been engaged for more than 27 years in the handling of rate and traffic work for the railroad industry in the East.

My statement comprises Part 1 of this reply and is directed to Verified Statement V.S. 98 of the National Association of Secondary Materials Industries. Inc., and Protest P–185 of Frankel Brothers & Co., Inc. and relates entirely to the protestant's statements on non-ferrous metal and alloy scrap.

My name is Joseph M. Feldman. I am a member of the Research Group, Traffic Executive Association-Eastern Railroads, with headquarters at Two Pennsylvania Plaza, New York, N.Y. 10001. I have been engaged for more than 14 years in the handling of rate and traffic work for the railroad industry in the East.

My statement comprises Part 2 of this reply and is addressed to that portion of Verified Statement V.S. 98 insofar as it relates to rags, textile waste and related articles.

My name is Charles A. Darrell. I am a member of the Research Group, Traffic Executive Association-Eastern Railroads, with headquarters at Two Pennsylvania Plaza, New York, N.Y. 10001. I have been engaged for more than 23 years in the handling of rate and traffic work for the railroad industry in the East.

My statement comprises Part 3 of this reply and is addressed to that portion of Verified Statement V.S. 98 opposing the increase proposed under Ex Parte No. 281 insofar as it pertains to paper waste and scrap.

Part 1—Non-Ferrous Metal and Alloy Scraps

Basically, protestant alleges that in publishing general freight rate increases on non-ferrous metal or alloy scrap the railroads have overlooked the competitive impact of the transportation cost. Significantly the non-ferrous metal and alloy scrap industry has consistently sought and been granted downward rate adjustments throughout Official territory.

Incentive rail rates were established in 1963 covering a complete list of non-ferrous metal scraps with minimum weights ranging from 40,000 to 80,000 pounds. Effective December 10, 1969, the Eastern railroads published a further downward revision in the overall rate levels by establishing 100,000- and

120,000-pound incentive rate scales. The 1970 ICC Freight Commodity Statistics indicate that these incentive rate scales and the lower rate levels resulted in an average load within Official territory of 84,000 pounds on all non-ferrous scrap metal, waste or tailings (excluding iron or steel scrap metal, waste or tailings). To illustrate, Columns A of Appendix "A" shows 40,000- and 80,000-pound rate levels applicable prior to the establishment of the first incentive rates in 1963. This exhibit also includes the present 40.000-, 60,000-, 80,000-, 100,000- and 120,000-pound rates at the Ex Parte 267–B level in Columns B. An examination of Appendix "A" conclusively demonstrates that the 120,000-pound rate level is relatively the same or below the rate level applicable approximately 9 years ago. Obviously, the Eastern Railroads have assisted the non-ferrous metal or alloy scrap industry in maintaining the same basic hundredweight charge.

While admitting that scrap metal is returned for its economic value, protestant National Association of Secondary Materials Industries contends that non-ferrous metal or alloy scraps are low grade and low value commodities which cannot absorb increases in freight rates. Appendix "B" demonstrates that many scrap metals have increased substantially in value during the same 9-year period when the rate levels remained basically unchanged.

While attempting to create the illusion non-ferrous scrap has a lower value than iron or steel scrap at page 8 of Verified Statement V.S. 98, protestant admitted there is no relationship between the two. Appendix "C", which compares the December, 1971 prices of various non-ferrous metal scraps with scrap iron and steel at Pittsburgh, is developed from "Secondary Raw Materials," the official publication of the Waste Trade Industry. This statement clearly shows that iron or steel scrap, excluding high alloy specialized stainless steel scrap (which amounts to only slightly more than 1% of the total iron or steel scrap stocks), ranges in value from $10.00 per gross ton to $44.00 per gross ton. On the other hand, non-ferrous metal or alloy scraps range from 2 cents per pound ($44.80 per gross ton) to 39 cents per pound ($873.60 per gross ton). In economic value, non-ferrous metal scrap is thus not related to the iron or steel scrap.

Protestant further alleges that the proposed surcharge would be contrary to the Commission's order in Ex Parte 267, where-

in the Commission imposed a holddown based upon environmental considerations. The Commission's ruling in Ex Parte 267, however, was based, at least in part, on the fact that the carriers were seeking to improve their net revenues. The minimal 2½ percent emergency surcharge increase here is insufficient to meet the railroads' increased costs.

PART 2—RAGS, TEXTILE WASTE AND RELATED ARTICLES (STCC 4022 AND 4026)

Protestant offers no specifics in support of its plea for an exemption. It contends on generalities alone that the above commodities cannot bear a 2½ percent increase because of their low value and because their prices have declined throughout the inflationary spiral of recent years. Even if correct, neither of these assertions would constitute justification for denying the railroads the needed revenues which the sought increase would provide. They are, however, incorrect.

The following table, taken from NASMI's monthly magazine, shows the value of these commodities ranges from $11 to $20 per hundredweight and that prices have, indeed, risen.

WASTE MATERIAL PRICES—WIPING MATERIALS, NEW YORK

	Cents per pound	
	February 1970	December 1971
No. 1 White Wipers	16 -17	17 -18
No. 2 White Wipers	13 -14	13½ 14½
No. 3 White Wipers	9 - 9½	10½-11
No. 1 ganzies, selected	18½-19	19 -20
No. 2 ganzies	14 -15	15 -16

Protestant cannot justifiably claim that injury would result from the increase. Statement TD–1 (1969, U.S. to U.S.) indicates the average haul of textile waste to be 527 miles at an average tonnage of 24.7. The applicable rate for this average haul from Agent Maurer's Tariff E–2009-series, of 63 cents per 100 pounds, minimum weight 50,000 pounds, would produce charges of $315.00 per car. The Ex Parte 281 surcharge would amount to only $7.88 per car. This hardly munificent amount is to be contrasted with the value of 50,000 pounds of the lowest priced commodity shown in the foregoing table, No. 3 White Wipers, of 11 cents per pound, or $5,500 per car.

Part 3—Paper Waste and Scrap

Under the guise of "IMPLEMENTATION—NATIONAL ENVIRONMENTAL POLICY ACT OF 1969" the National Association of Secondary Industries, Inc. (NASMI) would have it appear that while the price of waste paper has been going down, the price of transportation has been going up. There is, however, no connection between the two.

Scrap paper prices are in fact controlled by economic conditions. An authority on the subject of market competition put it this way in an editorial appearing in the Paper Trade Journal, October 11, 1971, at page 7:

> As we have pointed out earlier ("Paper Trade Journal" July 5, 1971), the greatest impediment to the use of secondary fibres by our industry is economics. The same is true of the merchandising of these products. As long as integrated pulp and paper mills insist on disposing of the majority of their output at unrealistically low prices, there is little room for the waste paper consuming mill to maneuver. How can he sell his perfectly adequate, but slightly inferior, products if the large virgin pulp mills are aways offering their products at bargain basement prices?

In 1966, the railroads transported 7,768,023 tons of waste paper. The volume rose to 8,064,428 tons in 1970, although there were four general freight rate increases during this period. (ICC Freight Commodity Statistics. Obviously freight rates had no adverse effect upon consumption of waste paper.

NASMI states at page 4 of its statement, that beginning with Ex Parte 256 and including Ex Parte 267, freight rates on waste paper have increased 31 percent. This is misleading, as Appendix "D" hereto readily discloses.

Appendix "D" shows the rates between representative points in 1964 at the Ex Parte 223 level and compares them with the rates presently in effect at the Ex Parte 267 level. Because of the incentive rates which the carriers have made and continue to make available to shippers of waste paper, the rates per 100 pounds are today only slightly higher than the lowest available rates in 1964. The 80,000-pound incentive loading rates were established May 10, 1964. More recently incentive loading rates have been published, subject to a minimum of 100,000/125,000 pounds. These rates, of course, are differentially lower than the 80,000-pound rates.

Appendix "D" shows that from Akron, Ohio to Coshocton, Ohio, the lowest available rate on waste paper in effect May 9, 1964 at the Ex Parte 223 level was 20½ cents per 100 pounds. Seven years later, despite the intervening increases in rail freight rates, the lowest available rate is only 21 cents, an increase of only ½-cent over this period. Using the longer haul from Gypsum, Ohio, to Boston, Mass., the lowest available rate May 9, 1964 at the Ex Parte 223 level was 59½ cents. Seven years later the lowest rate is only 62 cents, an increase of only 2½ cents per hundredweight.

VERIFICATION

DISTRICT OF COLUMBIA,
City of Washington, ss:

William J. Bolch, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

WILLIAM J. BOLCH.

Subscribed and sworn to before me this 27th day of January, 1972:

ELLEN M. HERLIHY,
Notary Public of the District of Columbia.

My Commission expires February 29, 1972.

VERIFICATION

DISTRICT OF COLUMBIA,
City of Washington, ss:

Joseph M. Feldman, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

JOSEPH M. FELDMAN.

Subscribed and sworn to before me this 27th day of January, 1972:

ELLEN M. HERLIHY,
Notary Public of the District of Columbia.

My Commission expires February 29, 1972.

DISTRICT OF COLUMBIA,
City of Washington, ss:

Charles A. Darrell, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

CHARLES A. DARRELL.

Subscribed and sworn to before me this 27th day of January, 1972:

ELLEN M. HERLIHY,
Notary Public of the District of Columbia.

My Commission expires February 29, 1972.

APPENDIX A

NON-FERROUS METAL SCRAPS

Miles	40,000 pounds (2)	80,000 pounds (2)	40,000 pounds (1)	60,000 pounds (1)	80,000 pounds (1)	100,000 pounds (1)	120,000 pounds (1)
	A	A	B	B	B	B	B
100	41⅓	33⅓	51	46	42	39	34
200	50½	43⅓	65	60	56	50	43
300	61⅓	50½	78	71	64	61	51
400	60	60½	87	82	75	68	61
500	70	68	101	94	83	77	65
600	90	75	112	102	92	84	72
700	90	81	123	112	101	94	81
800	104	90	133	122	111	101	87
900	111	95	141	130	119	107	94
1,000	119	99	151	138	124	115	99
1,100	125	105	159	145	132	122	103
1,200	132	111	168	153	139	129	111
1,300	141	116	175	160	145	134	117
1,400	145	124	183	168	152	141	122
1,500	152	130	192	175	160	149	127
1,600	161	135	201	183	165	153	132
1,700	167	141	209	191	173	160	138
1,800	195	145	216	200	181	165	144

(1) Authority: TL-CTR Tariff E-2009-H, ICC C-733.
(2) Authority: Trunk Line E-150, ICC A-1059.
A—Including Ex Parte 223-A increases.
B—Including Ex Parte 267-B increases.

APPENDIX "B"

NON-FERROUS METAL SCRAPS
NEW YORK DEALERS BUYING PRICES IN WHOLESALE LOTS

[Cents per pound]

	Col. 1 February 1963	Col. 2 December 1971	Col. 3 Increase or decrease percent
No. 1 Heavy Copper and Wire	24 -24½	33 - 34	+38.8
No. 2 Heavy Copper and Wire	22 -22½	29 - 30	+33.3
Light Copper	19½-20½	27 - 28	+38.3
No. 1 Composition	20½-20¾	29 - 30	+44.6
Brass Pipe	16 -16½	19 - 20	+21.2
Auto Radiators (unsweated)	15½-15¾	21 - 22	+39.7
Cocks and Faucets	16½-17	20 - 21	+23.5
Heavy Yellow Brass	14½-14¾	18 - 19	+31.0
Soft Scrap Lead	6 - 6½	4 - 4½	−30.8
Battery Lead Plate	2 - 2½	.. - 1	−60.0
Clean Hand Picked type shells	5½- 6	6 - 6½	+8.3
Old Zinc	3 - 3¼	3 - 3¼	0
New Die Cast Scrap	2¾- 3¼	3 - 3½	+7.7
New Zinc Clipping	5 - 5¼	6 - 6½	+23.8
Old Die Cast Scrap	1¾- 2	2 - 2¼	+12.5
Block Tin Pipe	80 -85	110 -115	+35.3
No. 1 Pewter	.. -60	72 - 75	+25.0
No. 1 Babbit (High Grade)	.. -40	--- -...	----------
Solder Joints	12 -12½	--- -...	----------
Pure Nickle Clips	53 -54	70 - 75	+38.9
Rolled Nickel Anodes	55 -56	75 - 85	+51.8
Nickel Rod Ends	53 -54	75 - 8*	+37.4
Nickel Turnings	40 -41	55 - 60	+46.3
New Monel Rods	25 -26	45 - 50	+92.3
New Monel Clips	25 -26	48 - 53	+103.8
Monel Cast	20 -21	42 - 48	+128.6
28 Aluminum Clippings	9¾-10¼	7½- 8	−23.8
Old Aluminum Sheet	7 - 7½	5½- 6	−20.0
Monel Sheet	25 -26	42 - 4*	+64.6
Brass Rod Ends	.....	25 - 26	----------
No. 1 Heavy Copper and Wire	22½-23	38 -39	+69.6
No. 2 Heavy Copper and Wire	21 -21½	32 -33	+55.3
Light Copper	19 -19½	29 -30	+55.8
No. 1 Composition	20½-20¾	30 -31	+49.4
No. 1 Composition Turnings	20 -20½	----------	----------
Auto Radiators	15 -15½	23 -24	+57.4
Yellow Brass	13 -13¼	19 -20	+50.9
New Brass Clippings	17¾-18	24 -25	+33.9
No. 1 Brass Rod Turnings	14½-14¾	22 -23	+55.9
Aluminum Castings	7½- 8	5½- 6½	−18.7
Aluminum Borings and Turnings	5½- 5½	4 - 5	−9.1
Old Zinc	3 - 3¼	4 - 5	+53.8
New Zinc Clippings	5¾- 5½	8 - 8½	+54.5
New Die Cast Scrap	3½- 4	3 - 3½	−12.5
Type Metal	7½- 7¾	9 -10	+32.1
Soft Scrap Lead	5½- 6¾	7½-8	+18.5
Battery Lead Plates	- 2	2 - 2¼	+12.5
Monel Metal	23 -24	43 -47	+95.8
Cocks and Faucets	.....	22 -23	----------
New Brass Clippings	.....	24 -25	----------
Mixed Aluminum Clips	.....	8 - 9	----------

Source: Secondary Raw Materials—Publication of the Waste Trade Industry.

APPENDIX C

PITTSBURGH DEALERS BUYING PRICES IN WHOLESALE LOTS, DECEMBER 1971

Non-ferrous Metal Scrap	Cents per pound	Scrap iron and steel	(Dollars per gross ton)
No. 1 heavy copper and wire	38 -39	No. 1 steel	32.00
No. 2 heavy copper and wire	32 -33	No. 2 steel	29.00
Light copper	29 -30	No. 1 dealer bundles	34.00
No. 1 composition	30 -31	No. 2 bundles	20.00- 21.00
Yellow brass	19 -20	No. 1 busheling	36.00
Auto radiators	23 -24	Machine shop turnings	16.00
Cocks and faucets	22 -23	Low Phi. plate (cut 8 ft.)	39.00- 40.00
New brass clippings	24 -25	Short shoveling turnings	17.00- 18.00
No. 1 brass rod turnings	22 -23	No. 1 railroad scrap	34.00
Aluminum castings	5½- 6½	Scrap rails 2 ft. or less	44.00
Aluminum borings and turnings	4 - 5	Stainless steel:	
Mixed aluminum clips	8 - 9	18-8 turnings	130.00-140.00
Old zinc	4 - 5	18-8 solids	210.00-250.00
New die cast scrap	3 - 3½	410 turnings	35.00- 40.00
New zinc clippings	8 - 8½	410 solids, bundles	75.00- 80.00
Type metal	9 -10	430 solids, bundles	90.00- 95.00
Soft scrap lead	7½- 8		
Monel metal	43 -47		
Battery lead plates	2 - 2¼		

Source: Secondary Raw Materials—Publication of the Waste Trade Industry.

AFFIANT: CHARLES A. DARRELL

APPENDIX D

COMPARISON OF RATES ON WASTE PAPER IN EFFECT MAY 9, 1964, VERSUS PRESENT RATES AT X-267-B LEVEL

From	To	28,300 Miles	Min. Wt.	Eff. 5-9-64 X-223	Present X-267-B
Akron, O.	Coshocton, O.	74	40M	22½	32
			60M	20½	28
			80M	.....	23
			100M	.....	(1) 21
Akron, O.	Baltimore, O.	109	40M	27½	38
			60M	24½	31
			80M	.....	28
			100M	.....	(1) 26
Dayton, O.	Gypsum	186	40M	29½	40
			60M	26½	37
			80M	.....	32
			100M	.....	(1) 28
Landover, Md.	Lynchburg, Va.	171	40M	32½	44
			60M	29½	40
			80M	.....	34
			100M	.....	(2) 33
Chicago, Ill.	Vincennes, Ind.	241	40M	38½	54
			60M	34½	47
			80M	.....	40
			100M	.....	(1) 37

From	To	28,200 Miles	Min. Wt.	Eff. 5-9-64 X-228	Present X-257-B
Gypsum, O	Boston, Mass	712	40M	65½	89
			50M	59½	81
			80M		70
			100M		(3) 62

Tariff Authorities: 40,000, 50,000, 80,000 Lb. Rates, Mileage Scale Rates Per TL-CTR E-2009-H, ICC C-733. 100,000 Lb. Rates Per (1) PC 11-Q, ICC 3069, (2) PC 1873-F, ICC 3816, (3) TL-CTR 218-R, ICC C-766.

Before the Interstate Commerce Commission

Ex Parte No. 281, Increased Freight Rates and Charges, 1972

REPLY VERIFIED STATEMENT OF R. D. ZUEST TO—

No.	Filed by—	On behalf of—
P-70	Arthur E. Williamson	State of Wyoming.
P-71	D. G. Willems	State of Montana.
VS-133	Carolyn Cox and Robert T. Lohman	The Merichem Company.
P-176	Jack K. Smith	Missouri Water Pollution Board.
P-180	Hudson B. Drake	U.S. Department of Commerce.

(Petroleum Refinery Wastes and Waste Sulphide)

January 28, 1972

My name is R. D. Zuest. I have been engaged in railroad traffic work since 1948 and since September 1966 have served in my present position as a member of the Standing Rate Committee, Transcontinental Freight Bureau, Western Railroad Traffic Association, with offices at 222 South Riverside Plaza, Chicago, Illinois 60606.

This statement is made in reply to Verified Statement No. 133 filed on behalf of the Merichem Company, opposing the application of the 2½ per cent surcharge to Petroleum Refinery Wastes and Waste Sulphide. This statement is also in reply to P–70, P–71, P–176, and P–180.

Protestant alleges in its statement:

(1) Petroleum Wastes and Waste Sulphide are unable to bear the proposed surcharge; (2) the Merichem Company is unable to bear the proposed surcharge; (3) the proposed surcharge will result in diversion of traffic from railroads to barge lines or cause discontinuation of the rail movement; (4) the

proposed increase will have an adverse effect on the environment.

The first allegation turns on the proposition that the waste materials involved are extremely low in value owing to the very highly dilute form in which they must be shipped. Contrary to the inference at page 5 of Witness Lohman's statement that protestant has shown the freight charges paid the railroads to transport those materials greatly exceed their value, protestant has not offered a shred of evidence showing what it pays for petroleum waste and what it charges for the waste sulphide which it sells to the paper industry.

The fact that waste sulphide moves in a diluted form is the choice of the shipper. At page 7 protestant complains that a tariff restriction limits the shipments of waste sulphide to no more than 20% of usable material which puts it at a disadvantage in competing with salt cake and caustic soda which contain the same active ingredients in more concentrated form. The tariff restriction complained of is in reality a commodity description which was initially urged upon the rail carriers by the protestant company when it sought and obtained a very low rate for the movement of its product. Obviously, the commodity description covers the commodity in its most easily produced or usable form since it is of long standing and there has been no request made to alter it.

The theme at pages 6 through 10 of Witness Lohman's statement and at pages 2 through 5 of Counsel Cox's argument is that the past railroad rate increases since Ex Parte 256 have inhibited the movement of these products by rail and that application of the proposed 2½ per cent surcharge will only compound that effect. This proposition is defeated by an examination of protestants' own figures. At page 5 of his Statement filed in this proceeding Witness Lohman states that in 1971 Merichem received just over 100,000,000 pounds of petroleum wastes by rail from numerous refineries. In Exhibit No. 1 to his Verified Statement No. V–214, filed May 1, 1970 in Ex Parte No. 265, Witness Lohman showed that only 97,304,784 pounds moved in 1969 by rail to Merichem's plant. The increases in rail rates have not resulted in a decrease in movements of petroleum waste by rail.

Merichem asserts that the surcharge will discriminate against its products and favor the competing products of salt cake and caustic soda (V.S. 133, Cox, p. 4; Lohman p. 8, Exhibit 2). The

argument is based on a false premise. It assumes that each of the products pays the same amount per ton of product moved. This is simply not true. The rate per ton for moving waste sulphide a given distance is substantially lower than the rate per ton for moving salt cake or caustic soda the same distance. Even assuming the charge per useable ton is the same, the surcharge would result in an identical impact on all three products.

At page 9 of VS–133 Witness Lohman attempts to support his argument that petroleum and sulphide waste materials cannot bear the surcharge by reference to his Exhibit 2. The figures listed do not show the amount of the increase sought in the proposed surcharge and could be misleading as to the possible impact of this increase. For example, using the rate in line 1 involving the movement of petroleum refinery treating waste from Sugar Creek, Mo., to Houston, Tex., the present rate is 46c per hundredweight, producing minimum revenue per car of $828.00. Under the proposed surcharge the minimum revenue per car will be $848.70. This is an increase of $20.70 per car or the equivalent of slightly over 1c per hundredweight. Another example, line 8 involving waste sulphide, the outbound product, from Houston to 11 points in Louisiana, the present rate is 24c per hundredweight, producing minimum revenue per car of $432.00. Under the proposed surcharge the minimum revenue per car will be $442.80. This is an increase of $10.80 per car or the equivalent of 0.6c per hundredweight. Other movements would produce similar results and increases of these very small amounts certainly could not influence an established movement. This nominal increase will merely help to offset the increased costs of transportation experienced by the railroads.

The second proposition of Witness Lohman discussed at pages 11 through 13 of his statement and at pages 1 through 5 of Counsel Cox's argument, is that the Merichem Company is in a depressed financial condition and cannot bear the increased cost resulting from the application of the surcharge. As shown above, the increase in the cost per hundredweight is almost too small to measure. This of course is due to the present low level of the rates which the railroads have published on the involved products to encourage their movement.

The inbound rates on petroleum waste and outbound rates on waste sulphide shown in Exhibit 2 reflect less than 10% of the first class rate between the same points, indicating clearly that these tank car rates are abnormally low.

The argument of Counsel Cox that the past increases in rail rates since Ex Parte 256 "are primary contributing factors to the company's present depressed financial condition" is inconsistent with the admitted change of the company's fortunes from a loss of $200,000 in 1969 to a profit in 1971 which must exceed $200,000 since it offsets the past loss. The decline in the selling price for the finished product shown in Witness Lohman's Exhibit 3 cannot be attributed to the railroad's rates. The Merichem Company has been inbusiness over 20 years according to page 24 of Witness Lohman's statement. From this we can infer that if Merichem survived past railroad rate increases it will continue in business if the present one is allowed.

Exhibit 4 compares the operating ratio of the railroads with that of Merichem to support the conclusion that the railroads are better off than Merichem. The railroad expenses on which Exhibit 4 is based do not include taxes and net rents. When they are included, decidedly different results are obtained. These are set forth on the attached Restatement of Exhibit 4 and show that one region has a deficit and collectively the railroad ratio is higher than that of Merichem.

At pages 14 through 17 of his statement Witness Lohman alleges that the increases will result in a diversion of the involved traffic from rail to barge. This of course flies in the face of protestant's admitted increase in the use of rail to move petroleum waste from 97,304,784 pounds in 1969 to over 100,000,000 pounds in 1971.

This traffic will be diverted to barge when barge service is available to Merichem regardless of the railroad rate level, as long as the shipper finds it economical and feasible to do so.

The whole thrust of protestant's statement and argument is that the railroads should subsidize the movement of these waste products. It is significant that when protestant decided it could not make sufficient profit on the processing of wastes collected from 11 different refineries, it simply stopped collecting. If Merichem had the overwhelming desire to see that these wastes are safely disposed of in compliance with water pollution control laws and water quality standards (Lohman, page 15), it would not have stopped collecting from these 11 refineries. Protestant expects the railroads to be blind to their needs for revenues to cover expenses because an ecologically sound project is involved, but Merichem obviously marches to a dif-

402-909—73——4

ferent beat. Further, rail rates alone will not determine which refineries will be the source of Merichem's petroleum wastes. It is apparent that if Merichem pays the freight and utilizes leased tank cars it is to its advantage to obtain petroleum wastes as close to Houston as possible where the freight will be minimized and tank cars will produce as many turns per month as possible.

The statement at page 16 that Merichem has stopped collecting waste from the 11 refineries, "primarily" because of freight rate increases is open to question. Merichem continues to receive wastes from 100 refineries in 21 states and as far away as Canada. If Merichem can afford to import waste for over a thousand miles from Canada and Pennsylvania (Lohman Ex. 2), there must be other reasons than freight rates for ceasing to serve plants within that radius. One reason may be that the Houston facility is reaching capacity. In 1971, Merichem recycled 550 million pounds of waste (Lohman, p. 23). At 7½ pounds per gallon [1], this equals 73,000,000 gallons for the year. As the Houston plant was said to have a capacity of only 50,000,000 gallons annually, it appears that Merichem may be faced with *over*-supply. This casts a shadow over that company's complaint that increased freight rates may cause pollution.

After an extensive discussion of the benefits to society and the environment of recycling petroleum wastes, Witness Lohman makes it clear at page 29 that he is really suggesting the railroads be forced to handle those waste products and reprocessed waste products below cost if that is necessary for his company to make a profit and petroleum refineries to dispose of the pollutants they have created without cost to them. The railroads cannot be forced to shoulder the ecological responsibility of the nation as a whole and keep Merichem in business, no matter how useful its function. If Merichem is to be subsidized then such subsidy should come from appropriate government bodies and be recognized as such.

The circle by which petroleum waste is returned to use involves the oil company which produces the waste, the railroad which transports it, Merichem which processes it into waste sulphide, the railroads again which transport the waste sulphide, and the paper companies who use it. Of these elements, only the railroads are regulated. In a private economy,

[1] At p. 3, Witness Lohman states that 7,900 tons equals 50,000 barrels. At 42 gal/bbl., this equals 7½ lbs/gal.

each one of these elements is in business to make a profit. It is contrary to accepted standards of fairness to single out the railroads as the one element in the circle to be compelled to operate at zero or marginal profit in order to permit the recycling while each of the other elements is allowed to maximize its profits.

Disposal of the waste products must be considered a business cost. If the waste material must be shipped away in order to avoid polluting surface and underground waters, then the appropriate government bodies should give consideration to having those who create the waste bear the burden of the cost of transportation. It is apparent from this record that Merichem now has to pay the oil companies for the waste products it processes. If Merichem finds the profit squeeze is discouraging its collection of the petroleum waste it might well approach the oil companies to see if they would give away rather than sell their waste products or possibly even pay for ecologically sound disposal.

Unless the railroads receive enough money to maintain their tracks and facilities for safe operation, to provide an adequate number of engines and properly maintain them, and to pay tank car allowances to car owners, then the railroads are a withering asset which cannot be counted on in the long-term view to handle waste products and do its part in saving the environment.

RESTATEMENT OF MERICHEM EXHIBIT NO. 4: COMPARISON OF OPERATING RATIOS CLASS I RAILROADS WITH MERICHEM CO., NINE MONTHS ENDED SEPTEMBER 30, 1971

Item	Operating ratio	Total operating ratio
(1)	(2)	(3)
All 30 Eastern District Railroads	82.11	Deficit
All 13 Southern District Railroads	74.35	89.01
All 25 Western District Railroads	77.41	91.90
All 68 Class I Railroads	78.66	94.20
Merichem Company	90.44	90.44

Source: Column (2): From Merichem's Exhibit No. 4. Operating ratio relationship of *only* total railway operating expenses to total railway operating revenues. Column (3): Railroad data computed from AAR, R&E Series No. 667 and are relationship of total railway operating expenses, plus railway tax accruals, plus railway net rents—dr. to total railway operating revenues.

VERIFICATION

DISTRICT OF COLUMBIA, *City of Washington, ss:*

R. D. Zuest, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

R. D. ZUEST.

Subscribed and sworn to before me this 27th day of January, 1972:

ELLEN M. HERLIHY,
Notary Public of the District of Columbia.

My Commission expires February 29, 1972.

Railroads' Reply
Verified Statement No. 36
Affiant: J. R. Coxey

Before the
INTERSTATE COMMERCE COMMISSION

EX PARTE No. 281
INCREASED FREIGHT RATES AND CHARGES, 1972

REPLY VERIFIED STATEMENT OF
J. R. COXEY

to

P-39—Institute of Scrap Iron
& Steel, Inc.

VS-98—National Association of
Secondary Material
Industries, Inc.

ENVIRONMENTAL MATTERS

January 28, 1972

My name is James R. Coxey. I am Manager of the Environmental Studies Division of the Research and Test Department of the Association of American Railroads. My office is in the American Railroads Building, 1920 L Street, N.W., Washington, D.C. 20036.

The Environmental Studies Division has been created within the Association to work closely with the railroad industry and government agencies in the formulation, pro-

mulgation, and implementation of rules and regulations affecting the environmental impact of railroad operations.

Despite inadequate earnings, railroads in 1970 spent approximately $10 million in a continuing effort to control and, where possible, eliminate pollution. Research activities have been started in such areas as diesel emissions, human waste disposal, used tie disposal, right-of-way clearance, noise abatement, and other areas of pollution control. Arrangements are also progressing to utilize the research and technical support from related industries, educational and scientific organizations, and government.

VERIFICATION

DISTRICT OF COLUMBIA,
CITY OF WASHINGTON. } ss:

James R. Coxey, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

/s/ James R. Coxey
JAMES R. COXEY

Subscribed and sworn to before me this 28th day of January 1972:

/s/ Ellen M. Herlihy
ELLEN M. HERLIHY

Notary Public of the District of Columbia. My Commission expires February 29, 1972.

Railroads' Reply Verified Statement No. 39
Affiant: G. J. Robinson

Before the
INTERSTATE COMMERCE COMMISSION

EX PARTE NO. 281
INCREASED FREIGHT RATES AND CHARGES, 1972

REPLY VERIFIED STATEMENT OF
G. J. ROBINSON

TO

VERIFIED STATEMENTS AND PROTESTS
LISTED ON APPENDIX "A" HERETO

COAL AND IRON ORE

April 10, 1972

My name is G. J. Robinson and I have previously testified in this proceeding. This statement is in support of the proposed increases in the rates on coal and iron ore and is in reply to the opposition statements listed in Appendix A.

COAL

The increase in rates on coal for the Eastern District lines will reflect an average revenue increase of 3.7%, which is less than the average Eastern District overall revenue incerase of 4.1%.

Coal tonnage originated by U. S. Class I railroads has reflected a stability in relationship to total tonnage, while coal rail revenues in relation to total revenues have trended downward.

	% Coal of Total Carload Traffic	
	Tons Originated	Revenue
1958	25.9	13.3
1959	25.0	12.4
1960	24.6	12.5
1961	24.9	12.6
1962	25.4	12.5
1963	25.9	12.6
1964	25.5	12.1
1965	25.4	12.0
1966	25.4	11.4
1967	26.8	11.9
1968	26.8	11.0
1969	25.6	10.8
1970	26.9	12.0

Twc steel producers oppose the increases in the rates on coal to their mills. Alan Wood Steel Company (VS-211) indicates that its average coal rate will be increased 20¢ per net ton over the 2½% surcharge. This, of course, is not correct. The 2½% surcharge increased its average charges on coal approximately 18.2¢ per net ton. The proposed 4% increase, because of the 20¢ per net ton maximum, will further increase its average charges only 1.8¢ per net ton, or approximately ¼ of 1% over the rate increased by the 2½% interim increase surcharge.

A large portion of the tonnage of the other steel producer, Republic Steel Corporation (VS-286), will be limited to a twenty cent increase resulting in a minor hike over present levels. For example, there are substantial movements to Republic's Ohio plants from Southern Crescent mines at rates of $5.53 per ton and $5.85 per ton (X-267-B level). The effective percentage increases on these movements are 3.6% and 3.4%. This represents a 1% increase over the 2½% surcharge rate level, or net further increases of only 5¢ or 6¢ per ton.

As to the competitive position of iron and steel products, no increase is proposed on the rates on finished iron and steel products within the East and South and between these territories. The Eastern Lines' increase of 6% on primary iron and steel products applied to the revenues on finished iron and steel products is equal to $13.7 million. Moreover, the Eastern railroads made a major downward adjustment

in the rates on finished iron and steel products, which became effective on January 8, 1972.

Consumers Power Compny (VS-395, 395-A and 395-B) again seeks special treatment of unit train coal rates. These rates have been established at levels dramatically below the normal single car rates. The rates available to this protestant are no exception. For example, in July 1967, a trainload rate was established from Freeport Mine, Ohio in the Ohio Middle District to Essexville, Michigan, for movement in shipper-owned equipment which was $2.20 per net ton, or less than 50% of the normal single car rate of $4.67 per net ton. With the proposed 4% increase, the trainload rate will be $3.02 per net ton in contrast to a single car rate of $6.57 per net ton. In other words, the protested rate will be only 65% of the 1967 single car rate of $4.67 per net ton and 46% of the current single car rate.

To West Olive, Michigan a trainload rate in shipper owned equipment of $2.57 per ton was established on January 11, 1965, supplanting a single car rate of $4.77 per net ton. Including the proposed X-281 increase, the trainload rate will be $3.62 per net ton, still less than the 1965 single car rate and far less than the current single car rate of $6.69 per ton, including the proposed increase.

The group of three northeastern utilities (VS-299) also seek special treatment of their trainload rates. Beginning in 1963, the Eastern Lines initiated reduced trainload rates for the movement of steam coal to northeast utilities. Generally, these rates reflected a $1.50 per net ton reduction below the applicable single car rates. To those power plants closer to the mine regions the reductions were somewhat less. With the application of general increases, the rate spreads have increased. For example, the present trainload rate of $4.99 per net ton (X-267-B) from base district origins to Albany is $1.67 per net ton under the present single car rate (X-267-B). While rates vary from origin to origin and destination to destination, the general pattern is the same.

This group also stresses the trend to the use of oil in lieu of coal in the generation of utility power. Property Owners' Committee (VS-265-A) has noted that shifts to high-cost, low-sulphur residual oil have been brought on by federal and state environmental regulations. This is verified by the Third Quarter, 1970, Niagara Mohawk report to

shareholders. The relevant statements are extracted in Appendix B.

In connection with the opposition of the group of three Virginia and Carolina utilities (P-269 and VS-269-A), it should be noted that the comparison (Table 5, p. 12) of net railway operating income for the group of 6 selected railroads ignores entirely the drastic rise in carriers' fixed charges. If fixed charges had been included by protestant, the 1966-1971 comparison would show that for the six carriers the net income had declined in 1971 to 81% of the 1966 level, and below the 1970 level. In like manner, the margin of unit revenues over unit expenses (Table 6, p. 14) would have declined in 1971 to 73% of the 1966 level or from 68 cents to 50 cents per ton, and again below the 1970 level.

Iron Ore

The proposed increase on iron ore will mean approximately $4.9 million of additional revenues to the Eastern District carriers.

The great preponderance of iron ore movements in Eastern District are ex-lake volume shipments to the furnace points in Central territory, i.e., the Pittsburgh, Youngstown, Wheeling and Portsmouth areas. These rates generally range from $2.60 per gross ton to $3.93 per gross ton (267-B level). With a 4% increase, the 22¢ maximum will not come into play. The same is true with respect to movements of import ore through Philadelphia, Pa., Baltimore, Md. and Fairless, Pa. On the significant movements of import iron ore to consuming points in Eastern territory, the rates generally range at levels substantially below $5.62 per gross ton (X-267-B level) and the 22¢ maximum would not apply.

While there are some single car rates on North Atlantic import and ex-lake iron ore in excess of $5.62 per gross ton (the level over which the 22¢ maximum comes into play), they have no significant competitive impact and move relatively little tonnage.

The only area in which the maximum would come into play is on all-rail movements of iron ore from New York State and eastern Canada at rates in excess of $5.62 per gross ton (X-267-B level). I estimate that less than 5% of the total iron ore terminations (51.9 million tons in 1970)

in the East are all-rail movements to which the maximum will apply. It was concluded that in this instance a maximum should be imposed. Generally, the 22¢ maximum permits the full 4% increase to apply on traffic except the relatively small amount of long-haul all-rail movements. In this limited area it will encourage the long haul movement.

The average revenue per ton of $2.74 in 1970 to Eastern Lines for the transportation of iron ore is less than one-half of the average revenue per ton received by Eastern Lines from traffic generally. This is reflected in the comparison of iron ore tonnage and revenues to total tonnage and revenues.

Relationship of Iron Ore Terminated and Revenue to all Carload Revenue Traffic in Eastern District

Year	% Iron Ore of Total Tons Terminated	% Iron Ore of Total Revenues
1958	7.49	2.99
1959	7.48	2.80
1960	9.92	3.78
1961	7.68	2.84
1962	8.15	3.05
1963	8.11	2.95
1964	9.05	3.57
1965	8.73	3.36
1966	9.34	3.44
1967	8.78	3.02
1968	8.77	2.93
1969	9.27	3.15
1970	8.79	3.07

The Eastern railroads' average revenue on iron ore terminated in 1970 of $2.74 per gross ton was less than the average of $2.84 per gross ton in 1958. During this period U. S. iron ore prices have increased 26%, from $8.59 per gross ton to $10.80 per gross ton, as shown in Appendix C.

Statements by three steel producers were submitted in opposition to the increase on iron ore (VS-211, VS-227 and VS-286). These steel producers offer their profit picture as a basis for denying the increase. Alan Wood Steel is served exclusively by two bankrupt lines, i.e., Penn Central and Reading. Penn Central and Erie Lackawanna are among

the principal lines serving the other protestants—Republic Steel Corporation and Jones & Laughlin Steel Corporation. In fact, in 1970, these three railroads handled 37.4 million tons, or almost one-half of the 72.7 million tons of iron ore handled by Eastern District lines. Penn Central alone handled 34% of the total in the East.

Alan Wood Steel Company asserts that the rates on iron ore are excessive. As I noted, iron ore average revenues per ton in the East are less than one-half of the average revenues per ton on all traffic terminated in the East. Furthermore, with the exception of a temporary rate for intra-city movement at Baltimore, Md., the $2.31 per gross ton rate from Philadelphia to Swedeland, Pa. utilized by this protestant is the lowest rate on iron ore in Trunk Line territory.

It is surprising that the biggest user of long haul all-rail iron ore which will benefit from the 22¢ maximum has protested the increase. Jones & Laughlin points out that approximately 40% of its iron ore rail receipts, or 1,966,000 tons, are all-rail from eastern Canada and New York State. This represents the vast majority of all-rail eastern Canada and New York State ore movements. The rates from New York State origins range from $6.05 to $6.26 per gross ton at the X-267-B level. From Canadian origins they range from $6.91 to $8.64 per gross ton. On this traffic the 22¢ per gross ton will apply and reduce the increase below 4%. In fact, from some major Canadian origins the increase will be no more than the presently effective 2½% surcharge. For example, from Dane, Ontario, to Pittsburgh, Pa. the $8.64 per gross ton rate (X-267-B) will be increased by 2½% to $8.86 per gross ton.

I am attaching an Appendix D, a history of the Ex Parte adjustments on the ex-lake iron ore handling charges at Huron, Ohio which also apply at other Lake Erie ports.

VERIFICATION

DISTRICT OF COLUMBIA,
CITY OF WASHINGTON. } ss:

G. J. ROBINSON, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

/s/ G. J. Robinson

Subscribed and sworn to before me this 6th day of April 1972:

/s/ Ellen M. Herlihy
ELLEN M. HERLIHY

Notary Public of the District of Columbia. My Commission expires February 28, 1977.

APPENDIX A

Witness: G. J. Robinson

List of Protests and Opposition Verified Statements

No.	Affiant
VS-211	Alan Wood Steel Co.—Russell R. Sage
VS-227	Jones & Laughlin Steel Corp.—W. G. Kegel
VS-251	Iowa Power and Light Co.—W. M. Merrill
VS-260	New York State Electric & Gas Corp.—Alex R. Boyd
P-265	Property Owners' Committee—Brice O'Brien
VS-265A	Property Owners' Committee—Brice O'Brien
P-269	Carolina Power & Light Co., et al—John F. Donelan
VS-269A	Carolina Power & Light Co., et al—John F. Donelan
VS-286	Republic Steel Corp.—John W. Croswell
VS-299	Niagara Mohawk Power Corp., et al—John C. McWilliams
P-304	Foote Mineral Co.—P. B. Garvey
VS-329	Alabama Power Co., et al—James C. Ludwig
P-337	Certain Japanese Steelmakers, Gas Companies and Chemical Companies—John A. Kennedy, Jr.
V-349	American Crystal Sugar Co.—Howard N. Bull
VS-395	Consumers Power Co.—O. K. Petersen, John
395A	Guandolo, David G. MacDonald; R. P. Wilkin-
395B	son; Wm. E. Carpenter
VS-410	Coal Traffic Bureau of Northern West Virginia, Ohio & Western Pa.—Dwight L. Koerber
VS-450	Iowa Electric Light & Power Co.—Don L. Hunt

APPENDIX B

Witness: G. J. Robinson

THIRD QUARTER 1970
REPORT TO SHAREHOLDERS
NIAGARA MOHAWK
September 10, 1970

A three-phase construction program to triple power production and upgrade environmental quality of our steam-electric station at Oswego, N. Y., was announced in August.

The program, estimated at a cost of more than $150,000,000, is designed to provide additional power supply to meet growing energy needs in the upstate New York area.

The plan entails: 1) Conversion of the four existing 100,000-kilowatt steam generating units at the station from coal to oil to reduce air pollution, 2) the addition of a new oil-fired 800,000-kilowatt generating unit at the station site, and 3) the installation of additional transmission and switching facilities to connect the new unit to Niagara Mohawk's bulk power system and load centers throughout the state. A single high stack will accommodate not only the new unit but will replace the four existing stacks at the present station. The oil conversion, scheduled for mid-1972 completion, will improve the environment in the plant area. The new generator, scheduled for completion by late 1974, will increase the facility's capacity to 1,200 kilowatts, making it the largest power plant in the Niagara Mohawk system.

APPENDIX C

Witness: G. J. Robinson

IRON ORE PRICES VS FREIGHT RATES
1928 to 1970

Year	"IRON ORE PRICE" Average Value Per Gross Ton		"IRON ORE RATE" Average Revenue Per Gross Ton of Iron Ore Terminated by Class I RRs in Eastern District (incl. Poca Region)	Iron Ore Price Over Rate	
	At Mines In U.S.	Import At Country of Origin		U.S.	Import
1928	$2.46	$2.21	$1.05 (A)	$1.41	$1.16
1929	2.61	2.59	1.08	1.53	1.51
1930	2.64	2.92	1.06	1.58	1.86
1931	2.60	2.66	1.04	1.56	1.62
1932	2.42	2.64	1.02	1.40	1.62
1933	2.59	2.39	1.01	1.58	1.38
1934	2.58	2.32	1.01	1.57	1.31
1935	2.48	2.33	1.04	1.44	1.29
1936	2.56	2.37	1.08	1.48	1.29
1937	2.87	2.39	1.07	1.80	1.32
1938	2.81	2.49	1.07	1.74	1.42
1939	2.89	2.43	1.13	1.76	1.30
1940	2.51	2.50	1.17	1.34	1.33
1941	2.68	2.28	1.19	1.49	1.09
1942	2.63	2.93	1.24	1.39	1.69
1943	2.70	4.58	1.20	1.50	3.38
1944	2.70	4.33	1.26	1.44	3.07
1945	2.77	3.43	1.25	1.52	2.18
1946	3.07	3.77	1.20	1.87	2.57
1947	3.44	4.51	1.38	2.06	3.13
1948	3.91	4.48	1.59	2.32	2.89
1949	4.50	4.97	1.69	2.81	3.28
1950	4.99	5.31	1.77	3.22	3.54
1951	5.46	5.87	1.87	3.59	4.00
1952	6.09	8.49	2.01	4.08	6.48
1953	6.76	8.74	1.98	4.78	6.76
1954	6.91	7.56	2.08	4.83	5.48
1955	7.11	7.56	2.12	4.99	5.44

1956	$7.47	$8.24	$2.30	$5.17	$5.94
1957	8.31	8.47	2.54	5.77	5.93
1958	8.59	8.41	2.84	5.75	5.57
1959	8.69	8.77	2.66	6.03	6.11
1960	8.73	9.31	2.61	6.12	6.70
1961	8.99	9.70	2.57	6.42	7.13
1962	8.84	9.72	2.59	6.25	7.13
1963	9.22	9.72	2.49	6.73	7.23
1964	9.52	9.93	2.65	6.87	7.28
1965	9.53	9.84	2.62	6.91	7.22
1966	9.49	9.99	2.52	6.97	7.47
1967	9.92	9.97	2.35	7.57	7.62
1968	10.21	10.33	2.41	7.80	7.92
1969	10.34	9.88	2.49	7.85	7.39
1970	10.80	10.68	2.74	8.06	7.94

AUTHORITY: U.S. Bureau of Mines and ICC Freight Commodity Statistics.

APPENDIX D

Witness: G. J. Robinson

HANDLING CHARGES ON IRON ORE AT HURON, OHIO

(Rates apply in cents per 2,240 pounds)

DIRECT ORE

Ex Parte	Hold to Rail of Vessel	Rail of Vessel to Car
X-168-B	$.20	$.13
X-175-C	.23	.15
X-196-A	.24	.16
X-206-A	.27	.18
X-212	.28	.19
X-223	.28 (NI)	.22
X-256	.28 (NI)	.25
X-259-A (interim)	.28 (NI)	.26
X-259-B	.28 (NI)	.27
X-262	.28 (NI)	.29
X-265-A	.29	.30
X-265-B	.30	.31
X-267-A	.30 (NI)	.33
X-267-B	.30 (NI)	.35

INDIRECT ORE

Ex Parte	Hold to Rail of Vessel	Rail of Vessel to Dock	Dock to Car
X-168-B	$.20	$.31	$.20
X-175-C	.23	.36	.23
X-196-A	.24	.38	.24
X-206-A	.27	.43	.27
X-212	.28	.45	.28
X-223	.28 (NI)	.49	.31
X-256	.28 (NI)	.53	.34
X-259-A (interim)	.28 (NI)	.55	.35
X-259-B	.28 (NI)	.56	.36
X-262	.28 (NI)	.59	.38
X-265-A	.29	.62	.40
X-265-B	.30	.63	.40
X-267-A	.30 (NI)	.68	.43
X-267-B	.30 (NI)	.72	.46

(NI)—No increase.

RAILROADS' REPLY
VERIFIED STATEMENT No. 45
Affiant: R. L. J. Lacroix

BEFORE THE
INTERSTATE COMMERCE COMMISSION

EX PARTE No. 281
INCREASED FREIGHT RATES AND CHARGES, 1972

REPLY VERIFIED STATEMENT OF
R. L. J. LACROIX

TO

STATEMENT No.	FILED BY	ON BEHALF OF
VS-372	ROBERT T. LOHMAN	THE MERICHEM COMPANY

PETROLEUM REFINERY WASTES AND WASTE SULPHIDE

April 10, 1972

My name is Richard L. J. Lacroix. I am staff member of the Corporate and Public Management Division of Arthur D. Little, Inc., with offices at 35 Acorn Park, Cambridge, Mass. The Corporate and Public Management Division conducts organizational, economic and managerial studies on behalf of private industrial clients as well as government and semi-government institutions. The Natural Resources Group within Corporate and Public Management Division enjoys a worldwide reputation in matters pertaining to petroleum production, transport, processing and trade.

I am a process engineer, graduated from Delft Technical University in the Netherlands, and a member of the Royal Dutch Institute of Engineers. I am also a graduate of the Massachusetts Institute of Technology, where I obtained a Master's Degree in management. I have worked for six years in the processing industry and related activities in several Latin American countries. Since joining Arthur D. Little, I have conducted and am responsible for a number of technical and managerial studies for clients worldwide.

At the request of Counsel for the railroad petitioners in this proceeding I reviewed the verified statements of Robert T. Lohman--V.S. 133 and V.S. 372. Both of these statements convey the impression that the only alternatives facing an oil refinery for the disposal of their petroleum refinery waste is sale to the Merichem Co. or dumping in some manner which would do injury to the environment. My investigation indicates that this is not the fact.

One other alternate method of disposal is fluid bed incineration of liquid or semi-liquid refinery waste. This method of refinery waste disposal has been developed under a grant of the Environmental Protection Agency by the American Oil Company's plant at Mandan, North Dakota. The incinerator has been in continuous use since June 18, 1969. At present it incinerates that refinery's complete production of oil sludge and the caustic petroleum refinery waste, the latter being a product which could be processed by Merichem. I have recently investigated the operation of this incinerator and I have determined that its operation now is quite satisfactory and that operating costs have been kept below the level set as an objective by the refinery management. I have also determined that in the absence of this incinerator the refinery would find it difficult to dispose of the caustic waste and would have to consider alternatives which also entail costs to the refinery. In the absence of an incinerator the refinery might find itself in a position where it would have to pay to have the caustic waste hauled away. I have also determined that the current operation of the incinerator does not present major technical operational problems, nor are its products objectionable. The "off-gas" is essentially steam without odor. The solid product of the incinerator, due to its low level of toxicity and its small volume does not present disposal problems. The company which is operating the in-

cinerator at Mandan is in the process of constructing a larger unit at Whiting, Ind., to dispose of refinery waste at that point. The process of fluid bed incineration of petroleum waste, including caustic waste, is widely used in refineries in Europe and has been so for a number of years. Paper mills in this country use incineration to dispose of caustic liquids remaining after the paper making process.

In addition to Merichem, I have determined that there are two companies on the West Coast which receive and process petroleum refinery waste. One, the Productol Chemical Co. in Los Angeles, the other, the Northwest Petrochemical Co. at Anacortes, Washington.

Another alternative method of disposing of petroleum refinery waste is stripping the spent caustic waste solution with flue gas originating in the fluid catalytic cracking process. The resulting product of this stripping is neutral and free of hydrogen sulphide. Still another ecologically sound method of disposal for the refineries is direct sale of the spent caustic solutions to paper mills without intermediate processing.

For several reasons including reduction of toxic waste production, many of the refineries which are installing new facilities are adopting a process which will result in the creation of significantly less petroleum refinery waste. In these processes petroleum products are treated in a fashion so as to remove the sulphur directly rather than through caustic washing. The sulphur is recovered in saleable form and there is no creation of caustic petroleum refinery waste. The trend in the industry is toward this type of process.

It is clear that there are several methods of disposing of petroleum refinery wastes which are an alternative to selling it to Merichem or dumping it. All of these methods involve some cost to the refinery. For example, the incinerator method now in use at the American Oil Company refinery at Mandan, N. D., involves an annual operating cost of approximately $20,000, or 4.7¢ per gallon of waste. This is for a refinery with a crude running capacity of 50,000 barrels per day. On the basis of this capacity, the cost is .095¢ per barrel of crude processed. In fact, the cost inherent in the disposal of industrial wastes should be considered a legitimate operating expense. Such expense is recognized as a cost of doing business by various process-

ing industries, including, for instance, oil refineries that customarily have to pay to have their liquid wastes barged to sea. An entire industry exists specifically geared to the disposal of industrial wastes, such as oil sludges and acid sludges from petrochemical processing facilities. This industry has no saleable end product and its operation must be paid for by the companies which create the wastes.

In my opinion, we should consider Merichem to be a waste disposal company available as one of many alternatives to petroleum refineries as a means to dispose of liquid refinery waste in an ecologically acceptable manner. It is incumbent upon the refineries to consider Merichem's service as a cost in their operation.

Merichem can reduce the cost of its service through its recovery and sale of products of value contained in the petroleum refinery wastes. The amount of these valuable products in any particular batch of petroleum wastes depends on the type of crude processed by the refinery as well as the processes used by that refinery and the chemicals employed in the processes. The amount of caustic required to remove sulphur and other unwanted chemicals from the petroleum products to be sold by the refinery varies considerably. Merichem's election to use the petroleum waste of a particular refinery will depend on the amount of recoverable products in the waste and the selling price of such recoverable products. The fact that Merichem discontinued buying the waste of a particular refinery cannot be necessarily attributed to the increase in railroad transportation charges.

The Merichem Company is successfully engaged in the recovery of the valuable products from petroleum refinery wastes as shown by the announcement that it will increase its capacity to recover petroleum cresylic acids from 70 million pounds annually to 100 million pounds. This cresylic acid, of course, is recovered from the petroleum refinery wastes and this expansion of facilities means an added capacity to handle these waste products.

In this statement I have confined myself to the alternative means of disposing of petroleum refinery waste in a manner which is consistent with current environmental pollution standards. I have not endeavored to deal with the level of railroad rates on petroleum wastes which would maximize the railroads revenues.

VERIFICATION

DISTRICT OF COLUMBIA
CITY OF WASHINGTON. } ss:

R. L. J. LACROIX, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

/s/ R. L. J. Lacroix

Subscribed and sworn to before me this 6th day of April 1972:

/s/ Ellen M. Herlihy
ELLEN M. HERLIHY

Notary Public of the District of Columbia. My Commission expires February 28, 1977.

RAILROAD'S REPLY
VERIFIED STATEMENT No. 65
Affiant: Joseph M. Feldman

BEFORE THE
INTERSTATE COMMERCE COMMISSION

EX PARTE No. 281
INCREASED FREIGHT RATES AND CHARGES, 1972

REPLY VERIFIED STATEMENT OF
JOSEPH M. FELDMAN
IN REPLY TO
V.S. 376 NATIONAL ASSOCIATION OF SECONDARY
MATERIAL INDUSTRIES, INC.

TEXTILE WASTES

April 10, 1972

My name is Joseph M. Feldman. I am assistant member of the Research Group, Traffic Executive Association-Eastern Railroads, with headquarters at Two Pennsylvania Plaza, New York, N.Y. I have been engaged for more than 14 years in the handling of rates and traffic work for the railroad industry in the East.

This Reply Verified Statement is addressed to that portion of Verified Statement 376 which deals with Textile Waste as enumerated in item 890 of Ex Parte 281-A, which seeks a 6% increase in all territories other than from or to Southern Territory, where no increase is contemplated.

Protestant, National Association of Secondary Material Industries (NASMI), vaguely advances three contentions as to why the proposed increases in rates on Textile Waste

should not be approved. Its first is that "freight" costs do and will represent too great a percentage of the sale prices of the various commodities included within the general description. It purports to present comparisons of "freight" costs with prices in tables on page 6 of Part I and pages 3, 4 and 5 of Part II. None of these showings indicates the extent of the actual rail movement, if any, under the rail rates shown. All such deal only with the very lowest-priced secondary commodities.

Specifically, the table on page 6 shows no rate authority and does not even indicate that the movement involved is made by rail. If the amount shown as "average freight to plant" is excluded on the assumption that movement was by truck, the freight charges, assuming them to be rail charges, are considerably lower than the percentages of sale price claimed by protestant.

As to the table on page 3, the freight rates shown, assuming they move traffic, range from 13 percent to 21 percent of the value of the commodity, somewhat below the "20 percent to 30 percent average" claimed by protestant.

The table on page 4 once again ignores the fact that many textile wastes are high-valued. For example, No. 1 Ganzies were valued at $20 per cwt. at Chicago in December, 1971.

The table on page 5 compares rail rates on certan low-valued waste materials with those on high-valued Rag Pulp, presumably a "virgin material." The prices shown for the latter do not indicate their source.

Protestant's second claim is that a "price bias" exists in favor of virgin materials as opposed to secondary ones. The only specific as to this claim is the table on page 5, described above. It is pertinent to note the rate comparison is between specific, point-to-point, commodity rates on the virgin material, which rates were published to meet a specific competitive situation, and general scale rates on the secondary material.

Protestant in Part II, pages 2 and 6, speaks of diversion of rail traffic to truck. No specific examples are offered. Protestant does provide, on page 6, a comparison of 1966 and 1969 movements, but such is of no value inasmuch as cars shown represent those taken as the sample in the 1% carload waybill study for those years. Also, on page 6, protestant indicates that rail traffic is subject to diversion because of its short-haul nature. A glance at the full in-

formation set forth in protestant's source, *Carload Waybill Statistics, 1969,* refutes this thought:

Average Haul Per Car

US to US — 527	OFF to US —539	SOU to SW—911
US to OFF— 578	OFF to OFF—377	WTL to US—836
US to SOU— 297	OFF to SOU—876	SW to US—762
US to WTL— 706	SOU to US —488	SW to SW—469
US to SW — 846	SOU to OFF—722	
US to MTP—2335	SOU to SOU—261	

VERIFICATION

DISTRICT OF COLUMBIA,
CITY OF WASHINGTON. } ss:

JOSEPH M. FELDMAN, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

/s/ Joseph M. Feldman

Subscribed and sworn to before me this 6th day of April 1972:

/s/ Ellen M. Herlihy
ELLEN M. HERLIHY

Notary Public of the District of Columbia. My Commission expires February 28, 1977.

RAILROAD'S REPLY
VERIFIED STATEMENT No. 76
AFFIANT: G. J. ROBINSON

BEFORE THE
INTERSTATE COMMERCE COMMISSION

EX PARTE No. 281
INCREASED FREIGHT RATES AND CHARGES, 1972

REPLY VERIFIED STATEMENT OF

G. J. ROBINSON

IN REPLY TO

PROTESTS AND VERIFIED STATEMENTS
LISTED ON APPENDIX "A" ATTACHED HERETO

SEMI-FINISHED IRON AND STEEL AND SCRAP IRON

April 10, 1972

My name is G. J. Robinson. I am Vice-Chairman, Traffic Executive Association-Eastern Railroads, located at Two Pennsylvania Plaza, New York, N. Y. 10001. I have been engaged in traffic and transportation work for more than 23 years with the Traffic Executive Association-Eastern Railroads.

This statement is filed in reply to opposition statements objecting to the proposed increases on semi-finished iron and steel and iron and steel scrap.

Semi-finished Iron and Steel

Only two verified statements were filed in opposition to the proposed 6% increase on semi-finished iron and steel. In Verified Statement Nos. 227 and 286, these producers complain that there is no justification for the proposed increase on semi-finished iron and steel. They point to the absence of any increase on *manufactured iron and steel (finished steel) and suggest that the same competitive conditions should compel the similar exclusion of semi-finished iron and steel.

As this Commission is well aware, the major movement of finished iron and steel products takes place within Official Territory. The Official Territory carriers recently made effective a substantial reduction in the rates applying on both finished and semi-finished products. This adjustment became effective on January 8, 1972, and reflected a reduction of approximately 8% in the railroads' gross revenues on finished iron and steel. The adjustment was made to meet motor carrier competition and the same considerations which motivated the respondents in making this reduction also dictated that no increase should be made at this time on finished iron and steel.

There is no question but that the costs of transporting all products by rail, including both finished and semi-finished products, have substantially increased. The exclusion of the finished iron and steel products, however, was dictated by the competitive circumstances at the time. It is worthwhile to observe at this point that the absence of any increase on finished articles means approximately $13,700,000 less in transportation costs to producers and consumers of finished iron and steel. This is shown in my Appendix "B", which also shows that the steel producers' and consumers' contribution through the 6% increase on the semi-finished materials comes to only $3,300,000.

With respect to the allegation that the same competitive conditions should compel no increase on the semi-finished products here, there are several points to be made. In my Appendix "C", consisting of two statements, I have first set forth a list of the rates in effect between representative points where there is a substantial movement of plant-to-plant semi-finished iron and steel. The favorable oppor-

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*—As named in List 2, Sections A, C and D of TL-CTR 556-K, ICC 706.

tunities presented to these shippers in the form of volume rates are self-evident. On a shipment of 300,000 tons per year from Detroit, Mich. to Midwest, Indiana, for example, the rate per ton is less than one-half of the single car rate. These volume rates, of course, are extensively used on these plant-to-plant movements.

On page 2 of Appendix "C", I have set forth the single car rates presently applying on finished iron and steel which became effective on January 8, 1972, and I then compared the semi-finished rates shown on page 1 with the finished iron and steel rate. It will be noted that the percentage relationship of semi-finished rates to the rates on the finished product is presently as low as 38%.

The competitive circumstances thus differ between finished and semi-finished iron and steel, and there is no good reason why the semi-finished products should not contribute their proportionate share of the railroads' increased burden. As evidenced by the carriers' recent competitive reduction on finished iron and steel, the railroads stand ready to assess the development of any similar situation with respect to semi-finished products and to take appropriate steps.

Scrap Iron

The major movement of scrap iron and steel takes place within Official territory, and the Official territory lines propose an increase of 4 percent. As in the past, the scrap iron industry seeks a holddown limiting the increase in scrap iron rates to the increase proposed on iron ore. Within the East, the proposed increase on iron ore is 4 percent, maximum 22¢ per gross ton.

It should be of some assistance to first define the area of controversy. The present average rate on scrap iron within the East (excluding the 2½ percent surcharge) is $5.86 per ton. A 4 percent increase means an increase of 23¢ per ton on scrap iron. A holddown on scrap iron would therefore affect the anticipated revenues on all scrap iron moving at the average rates or above. On the other hand, the average rate on iron ore within the East is $3.29 per ton and a 22¢ per gross ton holddown is of little or no consequence, since the average increase on iron ore will be only 13¢ per gross ton. As a matter of fact, the only significant movement which would be affected within the East is the movement

from Benson Mines, New York, and Eastern Canada to the Pittsburgh area. Actually the 22¢ per gross ton holddowns on iron ore simply parallels the 20¢ per net ton holddown which is proposed on coal within the East. Comparable holddowns on coal and iron ore are a not uncommon practice in Ex Parte increase proposals.

In this proceeding, the scrap iron industry has filed two verified statements, V.S. 335 (Dr. Cutler) and V.S. 335-A (Mr. Barnes). There is also a protest filed on behalf of the Northwestern Steel and Wire Company (V.S. 219), but that statement simply repeats the Commission's findings in Ex Parte 256, and the Commission has long since corrected that decision in subsequent Ex Parte proceedings.

While my statement is directed primarily to certain contentions set forth in V.S. 335 and V.S. 335-A, another statement is being submitted by Mr. Pepper on behalf of the railroad industry in which the more technical aspects of scrap iron use in steelmakng are discussed. As I have stated earlier in this proceeding, I have no expertise in the steelmaking process as such. My comments are thus directed toward the scrap iron-iron ore controversy in terms of freight rates and transportation characteristics.[1]

Simply stated, the scrap iron industry contends that an increase in the freight rates on scrap iron which exceeds to any extent the increase proposed on iron ore has a substantial adverse effect on the use of the former in the steelmaking process with a consequent adverse effect upon the human environment. As I have recently pointed out, however, (see V.S. 202 filed in this proceeding, February 27, 1972, Appendix B), the price of scrap iron in the market place fluctuates significantly with no apparent relationship to freight rates or freight rate increases. For example, there were no general freight rate increases during the period 1961-1966, yet, as shown in Appendix B to V.S. 202 herein, the composite price of No. 1 heavy melting scrap during that period fluctuated between $26.89 per ton and $36.37 per ton, a variation of almost 50 percent. Assuming that the price of scrap is of actual importance to the purchaser it necessarily follows that freight rates have very little to do with anyone's decision as to the use of scrap

[1] The differences between scrap iron and iron ore in terms of transportation characteristics are also highlighted in a separate statement filed herein by Mr. Wascoe.

iron or iron ore. In this instance, of course, we are concerned with an average increase of only 23¢ per gross ton on a commodity which can and does fluctuate in terms of dollars-per-ton from one month to another.

As a result of the material submitted by both the railroads and the scrap iron industry during the earlier phases of this proceeding, the Commission itself has concluded that:

> ". . . it taxes credulity to believe that the movement of an item may be greatly impeded by an increase in freight rate of 12 cents per ton when the speculative price rise of that item may be as much as $4.25 per ton in a single month, and over a 3 year period the value of that item has risen about $16 per ton." (Commission's Draft Environmental Impact Statement served March 6, 1972.)

In the same Statement, the Commission concluded that the evidence adduced thus far was insufficient to support a holddown for scrap iron, and it suggested, among other things, that the industry might submit additional data including the costs of recyclable material to dealers and the rate of return for the reclaiming and salvage industries. It is in this context that I now turn to the opposition statements filed by Messrs. Barnes and Cutler.

As I understand the conclusion reached by Mr. Barnes (V.S. 335-A), he finds that there is a built-in bias in the existing freight rates in favor of iron ore and to the detriment of scrap iron of $1.49 per ton. It should first be pointed out that the issue here is a proposed increase of only 4 percent. It does seem therefore that while Mr. Barnes' work would be appropriate for consideration in an investigation of comparable freight rate levels, it is well beyond the scope of the issue here, viz., the reasonableness of the increases proposed. In the course of his discussion, however, Mr. Barnes develops a formula in which 2,000 pounds of scrap iron is equated with 3,167 pounds of iron ore plus 602 pounds of coal. (p. 13) The latter are stated as the components required to produce one ton of hot metal. In previous proceedings the railroads have compared the average increase on a ton of scrap iron versus the average increase on the commodities utilized in the production of one ton of pig iron, demonstrating that the total increase on the latter group exceeded the increase which would re-

sult on a ton of scrap iron. (See R.V.S. 17, Appendix C, January 28, 1972).

As shown in my Appendix D, attached hereto, a similar result would follow from a transportation standpoint in the case of Mr. Barnes' formula. Thus, the 4 percent increase proposed on 2,000 pounds (one net ton) of scrap iron, would mean an increase of 20.92 cents. The 4 percent increases applied to 3,167 pounds of iron ore (average rate $3.29 per gross ton) and 602 pounds of coal (average rate $3.45 per net ton) totals 22.8 cents. Even on Mr. Barnes' equation the proposed percentage increase actually favors scrap iron versus hot metal in terms of transportation costs.

In Mr. Barnes' comparison of average freight rates, I moreover, find no mention of the costs involved in the transportation of iron ore prior to the rail move. For example, no account is taken of the costs of the water movement which precedes the rail movement from Lake Erie or North Atlantic ports to the Pittsburgh District. Furthermore, the Barnes' study is based upon the premise that the steelmakers' decision is based solely on rail transportation costs, whereas Mr. Barnes' own figures indicate that only 74 percent of scrap iron moves by rail, only 65 percent of the metallurgical coal moves via rail and only 58 percent of the iron ore moves via rail.

In addition, there is no mention whatsoever in Mr. Barnes' statement of the differing transportation characteristics of scrap iron and iron ore. As noted above, a statement filed herein by Mr. Wascoe illustrates those differences on the Southern Pacific. These differences in transportation characteristics in terms of average loading, average haul, volume, and distribution of movement were detailed by the Commission in *Institute of Scrap Iron and Steel, Inc.*, v. *Akron, C.Y.R.*, 316 I.C.C. 55, and there has been no significant change since that time. In this same context, I do not understand Mr. Barnes' statement at page 15 that the railroad rate structure does not recognize the "balloon nature" of obsolete scrap as it is being collected. The railroad rate structure must of necessity take into account average weights, average density, etc., if the revenues in the end are to cover the costs.

The first portion of Dr. Cutler's statement (V.S. 335) is addressed to the alleged necessity for a holddown on the

scrap iron increases. At page 7, Dr. Cutler suggests that discrimination in rates, scrap iron versus iron ore, does in fact exist and in that context he refers to certain "criteria" which would establish the existence of discrimination. These "criteria" were set forth in my V.S. 202. Dr. Cuter states that these criteria, "a steady decline in the movement of recyclable scrap" and "a steady decline in price", have in fact occurred. I disagree. In V.S. 202, I referred to the fact that the scrap iron industry have been complaining of discrimination in terms of freight rates and freight rates increases since the succession of increase proposals began in 1967, and I stated that if the contentions of the scrap industry were true, the result would have been a *steady* decline in the movement over that period and a *steady* decline in price (V.S. 202, page 3). As shown by Dr. Cutler at page 8 of his statement, the composite price of No. 1 heavy melting scrap declined from 1966 to 1967 and from 1967 to 1968. The Ex Parte 262 6 percent increase became effective in late 1969. That 6 percent increase applied to both scrap iron and iron ore. In 1969, however, the composite price increased to $30.56 and, in 1970, to $41.25 per ton. The composite price declined to $34.46 per ton in 1971, a greater price difference than could possibly be attributed to the amount of the increases in railroad freight rates. Also, while Dr. Cutler reports the composite price of $33.09 per ton in January, 1972, the Iron Age Issue of March 23, 1972 reports a composite price of $34.83 per ton. Thus, instead of a "steady decline", the price of scrap iron continues to fluctuate both up and down with no discernible relationship to freight rates or freight rate increases.

Dr. Cutler's suggestion that there has been a "steady decline" in the movement of scrap is based upon the contention that "purchased scrap declined as a percentage of the total furnace charge from 21.5 percent to 19.4 percent from 1957 to 1969". This apparently refers to the table shown at page 5 of V.S. 335*. Two comments are in order. In the first place, it is readily apparent that the percent of scrap consumed, as shown in the table, fluctuates from year to year. The percentage moved up and down during the

* It is improper to completely exclude "home" scrap from all comparisons. Home scrap moves by rail in significant quantities in plant-to-plant movements, and I am advised that portions of "home" scrap are from time to time brokered in the market place by the scrap iron industry.

period 1961-1966 when there were no general freight rate increases, and it continued to move in both directions in the period 1967-1969 when there were a succession of increases. Secondly, the table is misleading in terms of actual movement, as shown in Appendix A of my V.S. 202. Total scrap consumption in 1961 came to 64,327,000 tons. In 1969, however, total scrap consumption was 94,816,000 tons. Thus, the 19.4 percent use attributed to purchased scrap in 1969 represents substantially more in terms of actual tonnage of scrap iron than did the 19.5 percent use of purchased scrap shown for 1961. I should add, moreover, that the table at page 2 of Dr. Cutler's statement apparently relates to domestic consumption only and does not take into account a very significant increase in exported scrap iron which has occurred in the last few years.

In summary, the "criteria" that I suggested in V.S. 202 have not been met, and there are no additional facts set forth in the first portion of Dr. Cutler's statements which would dictate any different conclusions than that already reached by the Commission, viz.: that there is no reason for a holddown in the rates on iron and steel scrap.

The second portion of V.S. 335 is addressed to the subject of environmental impact. As noted above, however, the Commission's Draft Environmental Impact Statement made some specific suggestions for information which could only be provided by the scrap iron industry itself, e.g. "the rate of return for the reclaiming and salvage industries seeking holddowns." Dr. Cutler, however, contends that the profits of the members of the scrap iron industry are not an issue in this proceeding and that whether or not the industry is profitable is of no concern to this Commission (p. 13).

Under ordinary circumstances I would agree. In this instance, however, the final contention of the scrap iron industry is that a rate increase without a holddown will have an adverse effect upon the environment. The reasoning, if I understand it correctly, is that the increase in freight rates has a significant effect on the price of scrap iron, that scrap iron thereby becomes less attractive in the market place, lesser scrap is consumed, lesser scrap is collected, and the abandoned automobiles will remain to litter the streets. As I have previously pointed out, there is no discernible relationship between the level of freight rates

or the increases in freight rates and the price of scrap iron to the consumer. If the price, however, is not governed by the freight rates, but by supply and demand, it would seem that the decision to process and sell scrap or not to process nor sell scrap would depend on the economics (profit or loss) in the scrap iron industry. Secondly, there is not the slightest suggestion by either Mr. Barnes or Dr. Cutler that the delivered price of scrap iron would remain static or decline if a holddown were in fact applied, and since the Commission has no way of controlling the selling price of scrap iron, it has no way of controlling railroad freight rates with any assurance that the results would be beneficial to the human environment. Only the market place will determine whether scrap is collected and processed. As Dr. Cutler himself put it in an article appearing in WASTE AGE (July-August 1970):

> "Since obsolete scrap generally will not move unless the price "is right" or someone is prepared to make the price right by "paying" (subsidizing) if necessary, the solid metallic waste problem is, in the main, a problem of obsolete metallic items for which attractive markets do not exist such that the cycle will operate to steer the metallic sources back to the steelmaking furnaces."

APPENDIX "A"

VS 335	Herschel Cutler
VS 335A	T. M. Barnes
VS 219	L. D. Mangan
VS 227	W. G. Kegel
VS 286	John W. Croswell

APPENDIX "B"

Statement showing reduced contribution of producers and consumers by non-application of increase on Finished Steel, as well as revenue derived from increase of 6% on Semi-Finished Steel based on Eastern District 1970 handling.

STCC	Revenue Freight Originated		Revenue Freight Terminated		Total Freight Traffic (including duplications)		Gross Freight Revenue
	Cars	Tons	Cars	Tons	Cars	Tons	Dollars
3312 minus 33121	423,856	23,328,803	272,625	15,837,131	637,724	34,854,759	$185,634,688
3315	8,952	352,700	4,444	173,700	14,557	573,041	3,861,540
3391	8,353	397,842	7,072	349,217	14,457	704,060	4,111,673
3441	102,241	3,964,808	77,379	2,872,046	178,899	6,762,419	34,804,051
Total Finished Iron & Steel	543,402	28,044,153	361,520	19,232,094	845,637	42,894,279	$228,411,962
33121 (Semi-Finished Iron & Steel)	162,555	11,992,752	159,302	11,720,309	205,497	14,979,580	$ 55,191,370

Revenue Effect Applying 6% Increase

Finished Iron and Steel	$13,704,717
Semi-Finished Iron and Steel	$ 3,311,482

Source - ICC Freight Commodity Statistics year ended December 31, 1970

Semi-Finished Steel
Rates in Cents Gross Ton - X-267

Between	And	(2) Single Car	(3) 800 tons	(4) 5000 tons	(4) 10,000 tons	(4) 40,000 tons	(5) 300,000 tons
Pittsburgh, Pa.	Chicago Dist.	1361	1163	1096	1031	707	820
Youngstown, O.	Chicago Dist.	1280	1094	1029	966	679	707
(1) Cleveland, O.	Hennepin, Ill.	1326	1134	1068	1004	-	-
(1) Buffalo, N.Y.	Chicago Dist.	1373	1175	1108	1043	679	749
(1) Detroit, Mich.	Midwest Ind.	1061	918	828	764	409	480
Fairless, Pa.	Pittsburgh, Pa.	1232	1058	993	929	-	-
Fairless, Pa.	Chicago, Ill.	1876	1658	1374	1145	1075	-

(1) Applies from
(2) Single car
(3) Per shipment
(4) Per month
(5) Per year

Comparison of Rates on Semi-Finished Iron or Steel with Finished Iron or Steel 120M Scale Rates

Rates in Cents Gross ton X-267

Between	And	Finished Iron or Steel rate Min. Wt. 120,000 pounds cwt.	G.T.	Percentage Relationship of Semi-Finished Iron or Steel Rates (2) Single car	(3) 800 tons	(4) 5000 tons	(4) 10,000 tons	(4) 40,000 tons	(5) 300,000 tons
Pittsburgh, Pa.	Chicago Dist.	73	1635	83	71	67	63	43	50
Youngstown, O.	Chicago Dist.	60	1344	95	81	77	72	51	53
1) Cleveland, O.	Bennepin, Ill.	64	1434	92	79	74	70	-	-
1) Buffalo, N.Y.	Chicago Dist.	78	1747	79	67	63	60	39	43
1) Detroit, Mich.	Midwest Ind.	48	1075	99	85	77	71	38	45
Fairless, Pa.	Pittsburgh, Pa.	65	1456	85	73	68	64	-	-
Fairless, Pa.	Chicago, Ill.	108	2419	78	61	57	47	44	-

(1) Applies from
(2) Single car
(3) Per shipment
(4) Per month
(5) Per year

APPENDIX D

Effect of Percentage Increase on Scrap Iron and Components of Hot Metal

2,000 pounds of Scrap Iron—Average rate $5.86 gross ton
Average rate $5.23 net ton
$5.23 net ton × 1 ton = $5.23

3,167 pounds of Iron Ore—Average rate $3.29 gross ton
(1.5835 net tons) Average rate $2.94 net ton
$2.94 net ton × 1.5835 net tons = $4.655

602 pounds of metallurgical coal—Average rate $3.45 net ton
(.301 net tons)
$3.45 × .301 = $1.04

Equivalents

Scrap Iron		Iron Ore	3,167 pounds
2,000 pounds		Metallurgical Coal	602 pounds
		$4.66	iron ore
		1.04	met. coal
	$5.23	$5.70	
	.04	.04	
Effect	20.92 cents	22.80	cents

VERIFICATION

DISTRICT OF COLUMBIA,
CITY OF WASHINGTON. } ss:

G. J. ROBINSON, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

/s/ G. J. Robinson

Subscribed and sworn to before me this 6th day of April 1972:

/s/ Ellen M. Herlihy
ELLEN M. HERLIHY

Notary Public of the District of Columbia. My Commission expires February 28, 1977.

Railroad's Reply
Verified Statement No. 77
Affiant: Edward L. Pepper

Before the
INTERSTATE COMMERCE COMMISSION

EX. PARTE NO. 281
INCREASED FREIGHT RATES AND CHARGES, 1972

REPLY VERIFIED STATEMENT OF
EDWARD L. PEPPER
IN REPLY TO
V.S. 335 & 335A

SCRAP IRON & STEEL

April 10, 1972

My name is Edward L. Pepper. I graduated with an S.B. degree in metallurgy from the Massachusetts Institute of Technology in 1942. I also completed the Advanced Management Program at the Harvard University Graduate School of Business Administration. I have been on the staff of Arthur D. Little, Inc., since 1946. During that period of time I have specialized in studies that are related to the metallurgical industries, particularly to the steel industry, and I have had overall responsibility for many assignments within these industries.

I was elected a Vice President of Arthur D. Little in 1968. For the past 12 years I have been in charge of the Resource Consulting group in the Corporate and Public Management Division. In that role I have supervised and

directed many of the studies Arthur D. Little has conducted for companies in, or interested in, the iron and steel industries and the nonferrous metals industries.

I have had wide experience in North America, Europe, Asia and Latin and Central America on assignments related to the steel industry. I have been responsible for more than 15 technical-economic feasibility studies for new iron and steel-making capacity in the U.S. and Canada and in many other countries. I have both directed and participated in a number of major strategic planning, marketing, production, and diversification assignments for companies either in or considering entry into the metallurgical industries.

I am a member of the American Institute of Mining, Metallurgical and Petroleum Engineers; the Association of Iron and Steel Engineers; and the Iron and Steel Institute (London).

ADL has been asked to submit a reply statement concerning the technical and economic aspects of iron and steel scrap utilization and to comment on a report by Battelle Memorial Institute. This entire statement prepared under my direct supervision is attached to this cover document.

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX COUNTY } ss.

Edward L. Pepper, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

/s/ Edward L. Pepper

Subscribed and sworn to before me this 6th day of April, 1972.

/s/ Elizabeth M. Mahoney
Notary Public

My commission expires: May 18, 1973

IRON AND STEEL SCRAP
AN ECONOMIC PICTURE

April 1972

I. Summary

A. Purpose

The purpose of this study is to analyze the technical and economic aspects of iron and steel scrap utilization and to comment on a report by Battelle Memorial Institute, "The Impact of Railroad Freight Rates on the Recycling of Ferrous Scrap," dated January 14, 1972.

B. Conclusions and Findings

(1) The Battelle report:

(a) Is not a complete analysis of steel making because of the omission of capital requirements and costs which vary with process and geography.

(b) Does not consider nonintegrated steel mills which are a vital and growing part of the steel industry and are scrap-intensive.

(c) Does not consider many of the key factors a steel maker must in order to decide whether to build scrap-intensive or ore-intensive steel-making facilities. Among these are labor, access to markets, access to raw materials, environment, and minimum economic size.

(d) Oversimplifies the variations in steel-making processes by using the "black box" approach.

(2) There are distinct technical limits to the amount of scrap and blast furnace hot metal that can be used in steel making. Scrap and iron ore (in its many forms) are interchangeable in steel making only in given situations.

(3) There are three important types of steel-making furnaces used today: (1) the electric which uses

essentially nothing but scrap for its source of iron; (2) the basic oxygen furnace (BOF) which uses as little as 15% or as much as 30% scrap (but not more), and (3) the open hearth, which typically uses about 45% scrap, but can use all scrap. It uses varying amounts of scrap to meet fluctuations in demand.

(4) Substantial new investment is being made in scrap-intensive steel making:

   (a) New electric furnaces are being built to use essentially all scrap. They are thus insensitive to freight rates.
   (b) New, modified BOF's are being developed which can use more scrap than the BOF's in use today.

(5) Exports of scrap have been increasing gradually over time from a level of a few hundred thousand tons per year in the early 1950's to a peak of 10.6 million tons in 1970. This export demand is partly a result of expansion of electic furnace capacity in other countries. Such demand is relatively inelastic since the United States is the principal exporter of iron and steel scrap.

(6) Total tonnages of non-home scrap collections for domestic and export consumption are up about 50% from the late 1950's and early 1960's to 1969 and 1970.

(7) Scrap demand is based on economic variables, mainly steel demand. This changes, and scrap prices fluctuate. These fluctuations far outweigh proposed freight rate increases. Freight rate increases of the nature of those sought here have no significant effect on the use of scrap iron.

II. The Scrap Industry

A. Definition of the Industry

The main sources of scrap for the iron and steel industry can be considered as originating from three sources:

(1) mill scrap
(2) industrial scrap
(3) obsolete scrap

Mill scrap is generated within the steel plant itself and is usually consumed at the plant where it is generated. It is therefore sometimes referred to as home scrap. This scrap originates from spills of molten iron and steel, and from cuttings, croppings, and trimmings of the products prior to shipment of the finished steel.

Industrial scrap, sometimes called prompt scrap, consists of scrap which is produced from new steel handled in metal fabricating equipment, such as punch presses, machine tools, and forging dies, and is produced during the manufacture of such items as automobiles, construction equipment, farm equipment, and appliances. It is collected promptly from the factories where it is produced and returned to the steel mills.

The third important source, called obsolete scrap, consists of iron and steel products which are no longer useful and are discarded—e.g., machinery, construction equipment, automobiles, etc.

Obsolete scrap typically is collected by small local firms who cut up and clean the scrap and then either sell to or list the scrap for sale with one of the larger scrap brokers. The broker, in turn, sells it to an iron or steel producer, domestic or foreign.

Scrap prices are a function of supply and demand and are arrived at by a bid-and-ask process. As demand increases, prices increase, and scrap dealers go farther afield and to more remote areas to collect obsolete scrap. As demand decreases, prices drop and dealers use sources closer to home.

B. Scrap Consumption

Over the past fifteen years, the rate of scrap consumption in steel making has been relatively constant at slightly more than 50% of the total metallics used in the process. The balance is mainly blast furnace hot metal produced from iron ore. With the advent of continuous casting and other processes which improve the yield of acceptable product manufactured within the steel mills, less mill (home) scrap is being generated. On the other hand, the consumption of obsolete scrap is on the increase, primarily because motor vehicles are being scrapped and re-processed at an increasing rate.

The quantity of scrap consumed domestically has varied

between 94.8 million short tons (1969) and 56.4 million short tons (1958) during the period 1955-1971 (Table 1). Since 1960, the quantity of scrap consumed has increased by 42.6% or an average of 4.3% per year. Consumption by type of furnace and end product is shown in Table 2. Figure 1 illustrates the same data in a different way—the flow of scrap to various types of furnaces.

As indicated in this figure, total iron and steel scrap of 104,104,000 short tons, made up of several types of purchased scrap and of home scrap, was used by: (1) iron foundries, (2) steel furnaces, and (3) for exports. Steel furnaces used 76.8% (79,983,000 short tons) and exports accounted for 8.9% (9,290,000 short tons).

Cupolas and electric furnaces used the major part of the scrap going to iron foundries. The basic oxygen, open hearth, and electric furnaces used the major part of the scrap going to steel-making furnaces.

Witness Cutler (V.S. 335, p. 5) refers to scrap consumption in terms of percentages and states that purchased scrap is losing ground. Scrap tonnages give a different picture (Table 2A). The total of domestic purchased scrap plus exports and imports is up almost 50% from the late 1950's and early 1960's. Domestic purchased scrap consumption alone rose about 10 million tons during the same period.

C. Sources of Scrap Supply

The sources of scrap in the United States are indicated in Figure 2. Total scrap used by iron foundries, steel mills, and for exports during the year amounted to 104,106,000 short tons. Of this total scrap, home scrap was estimated to account for about 59%, or 61,675,000 short tons. The sources of home scrap by furnace type are indicated in the figure. Purchased scrap we estimated to account for the remainder, or 42,431,000 short tons. In turn, prompt industrial scrap was estimated to be the source of about 33% of total purchased scrap while obsolete scrap was estimated to account for the remaining 67% of purchased scrap. About 8 million short tons, or 28% of obsolete scrap, was estimated to have come from junk autombiles. Of the three sources of scrap, i.e., home, prompt, and obsolete, the latter is the one that expands and contracts most with changes in total demand.

The receipts, production, consumption, shipments and stocks of iron and steel scrap in 1969 are set out in Table 3. A total of 94,816,000 short tons of scrap was consumed domestically in 1969.

Table 4 indicates consumer stocks of scrap and pig iron for 1968 and 1969. Stocks of both decreased in 1969.

Other stocks of iron and steel scrap are not easily determined. The United States has 14-20 million junk autos and another 6-7 million are added to this stockpile each year.

D. Scrap Prices

Monthly scrap prices and yearly average prices for No. 1 heavy melting scrap are set out in Table 5. The range of price fluctuation for each year and the widest fluctuation between months is indicated in the last column of the table. The price of scrap swings significantly from month to month and within any one year. These month-to-month fluctuations, ranging as high as $8.64 per ton, bear no relationship to changes in freight rates.

One of Battelle's assumptions is that the price of No. 2 scrap range from $7 to $11 per gross ton below No. 1 scrap and that a decrease in the price of No. 1 scrap automatically means a corresponding drop in the price of No. 2 (page 20). This appears to be an oversimplification. The relationship between No. 1 heavy metal scrap prices and lower grade scrap prices is indicated in Table 6. Basically, prices for No. 2 heavy melting scrap fluctuate from $1.86 to $7.16 per ton below prices for No. 1 scrap steel at the same location (e.g., Pittsburgh).

E. Pig Iron Prices

Monthly composite pig iron and yearly average prices for the period 1948-1969 are listed in Table 7. Pig iron prices do not fluctuate significantly from month to month or within the year, except in response to general cost increases or demand changes.

III. Scrap Used Within the Iron and Steel Industry

Four distinct processes are used within the iron and steel industry to manufacture finished iron and steel products:

(1) electric furnace
(2) basic oxygen furnace
(3) open hearth furnace
(4) cupola furnace

All can and do use scrap in some form or other.

Each of these processes is explored below as to past rate of growth; projected output of iron or steel; the flexibility between the use of pig iron, hot metal and scrap; technology; and economics. Table 8 shows the relative use of pig iron and hot metal and scrap in each type of furnace in 1969.

A. Electric Furnace

1. Growth Rate

Steel output from electric arc furnaces has increased from 5,436,000 short tons in 1954 to 20,162,000 short tons in 1970 (Table 9). The average annual rate of increase in electric furnace steel output during this period has been 24.5%.

According to Battelle Memorial Institute, the electric arc furnace is expected to account for an increasing percentage of raw steel:

	1960	1970	1985
percent of all raw steel	8	15	30

2. Inputs, Technology and Economics

The electric arc furnace can use a 100% scrap charge, but usually uses about a 98% scrap charge, including some pig iron in the total charge for technical reasons. About 30% of scrap used is home scrap, and the remainder is purchased scrap.

In recent years, the electric furnace has been used more and more as a source of steel in this country. Table 9 which indicates raw steel production clearly shows the increasing importance of the electric furnace as a source of raw steel. New electric furnace capacity is continually being added in this country. In fact, the entire so-called "mini-mill" concept is based upon electric furnace and continuous casting.

A recent publication by the Battelle Memorial Institute[1] states that:

> "the high cost of money today is one reason for the increased attention being paid to the electric furnace as a source of hot metal. Other reasons lie in the ability of the electric furnace to use a 100% scrap charge, the growth of the mini-steel plant concept and the potential use of directly reduced or metallized pellets in the electric furnace."

Battelle goes on to state that;

> "in summary, the future demand for purchased steel scrap looks good. Supporting scrap usage are technologies and trends such as scrap preheating, electric furnace steel making and continuous casting."

Since electric furnaces in the short term will have to be operated almost entirely on scrap, those companies building and planning electric furnaces and spending tens of millions of dollars on finishing equipment for steel that is made in electric furnaces—and only in electric furnaces—must be reasonably certain in their own minds that both the availability and price of scrap will be acceptable during the next few years. Prudent companies would not make the investment otherwise. The investments, however, continue despite the upward trend in freight rates.

Indeed, a recent article in *Metalworking News*, commenting on the modification of the basic oxygen furnace, quotes the Vice President, Engineering, of a major Pittsburgh steel producer as saying that hot metal is more expensive than scrap. Thus, the interest in the electric furnace.

B. Basic Oxygen Process

1. Output

The basic oxygen process of making steel has grown extremely rapidly (at an average annual rate of 283%) from an output of 1,864,000 short tons in 1959 to 63,330,000 short tons in 1970.

2. Projected Output

The output of steel by the BOF process is projected by Battelle as follows:

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[1] *Metal Bulletin Monthly*, July 1971.

	1960	1970	1985
percent of all raw steel	3	45	60

3. Inputs, Technology and Economics

The basic oxygen furnace (BOF) converts hot metal (molten pig iron) into steel. The process uses smaller amounts of scrap, from 15% up to about 30%, than the electric furnace and the open hearth furnace.

Since most steel mills using this process produce approximately 30% scrap within their own works, they do not need to buy much scrap in the open market for their BOF's.

The limitation of approximately 30% scrap as an input material into the BOF is somewhat restrictive, and the industry has been seeking ways to use more scrap, presumably because of its availability, in the basic oxygen process. Some companies have increased their ability to use scrap in the BOF process by preheating before charging into the vessel.

C. Q-BOP Furnace

1. Output

U.S. Steel has recently announced the development of the Q-BOP process, a derivative of the basic oxygen process. At present, U.S. Steel is building Q-BOP process plants in Alabama and Indiana, but no Q-BOP plants are yet operational in the U.S.A. Estimated Q-BOP capacity presently planned or under construction is over 4,000,000 short tons.

2. Inputs, Technology, and Economics

One of the principal advantages to the Q-BOP process is the fact that it can use 20% more scrap in the charge than the convential BOF process. Thus, a Q-BOP plant probably could use up to 40% scrap in the charge. Certainly, the increased flexibility of the Q-BOP process with regard to scrap and hot metal could well be important to the industry during the next several years.

D. Open Hearth Process

1. Output

Output from the open hearth process has been declining, moving from 80,327,000 short tons in 1954 to 48,022,000

short tons in 1970 (Table 9). Until recently, it was the largest source of steel, but in the last two or three years, the BOF furnace has become more important (Table 9).

2. Project Output

The output of the open hearth process is projected as follows:

	1960	1970	1985
percentage of raw steel	90	40	10

3. Inputs, Technology and Economics

The open hearth has been a desirable process because of its flexibility with respect to the use of hot metal and scrap. Indeed, the open hearth furnace can use as little as 29% scrap or as much as 100% scrap. However, the operating and capital costs are high and throughput times long.

Typically, the open hearth furnace, as operated by the integrated steel companies, has used a charge that contains slightly less than 50% scrap (Table 8). The replacement of the open hearth by the basic oxygen process has resulted primarily in increasing the availability of scrap because of the BOF scrap limitation. This in turn has contributed to the growth of electric furnaces.

We doubt that any new open hearth capacity will be built in this country; indeed, open hearth production will probably drop gradually, being replaced by basic oxygen and electric-furnace processes. Complete elimination of the open hearth, however, is years away.

E. Iron Castings (Mostly Cupola Furnace)

1. Output

The output (in terms of shipments) of various iron castings has remained fairly constant over the period 1963-1970 (Table 10).

2. Inputs, Technology, and Economics

For the manufacture of steel castings, electric furnaces similar to those used in the basic steel industry generally

are used. For the manufacture of iron castings, a cupola furnace is frequently used. This type furnace uses an all-cold charge, typically a mixture of iron and steel scrap and cold pig iron. The newer, more modern cupolas have the ability to use more steel scrap than iron scrap as an input material for the production of iron for castings. Much of the scrap used for iron castings is iron. Iron and steel scrap is substantially less expensive than cold pig iron; thus, there is a real incentive for foundries to use iron or steel scrap, rather than pig iron, for the production of castings.

TABLE 1

DOMESTIC CONSUMPTION OF IRON AND STEEL SCRAP

(thousand short tons)

Year	
1946	49,484
1947	60,864
1948	64,963
1949	54,338
1950	68,901
1951	76,728
1952	69,023
1953	77,130
1954	61,354
1955	81,375
1956	80,315
1957	73,548
1958	56,359
1959	66,061
1960	66,468
1961	64,326
1962	66,159
1963	74,620
1964	84,625
1965	90,359
1966	91,583
1967	85,361
1968	87,060
1969	94,816
1970	85,188
1971	80,000 (est.)

Source: U.S. Bureau of Mines

TABLE 2

CONSUMPTION OF IRON AND STEEL SCRAP AND PIG IRON[1] IN THE UNITED STATES IN 1969, BY TYPE OF CONSUMER AND TYPE OF FURNACE OR EQUIPMENT

(thousand short tons)

Type of furnace or equipment	Manufacturers of steel ingots and castings[2]		Manufacturers of steel castings[3]		Iron foundries and miscellaneous users		Total all types[4]	
	Scrap	Pig Iron	Scrap	Pig Iron	Scrap	Pig Iron	Scrap	Pig Iron
Blast furnace[5]	4,779	---	---	---	---	---	4,779	---
Basic oxygen converter[6]	19,828	46,408	---	---	---	---	19,828	46,408
Open hearth furnace	30,252	37,397	454	50	---	---	30,706	37,447
Electric furnace	19,575	213	2,466	42	1,767	77	23,807	332
Cupola furnace	1,832	154	365	6	12,782	2,751	14,978	2,911
Air furnace	32	6	57	14	121	72	210	92
Other furnaces	343	---	1	---	163	3	506	3
U.S. Total[4]	76,641	84,178	3,342	113	14,833	2,903	94,816	87,193

(1) Includes molten pig iron except that used for ingot molds and direct castings.

(2) Includes only those castings made by companies producing steel ingots.

(3) Excludes companies that produce both steel ingots and steel castings.

(4) Data may not add to totals shown due to independent rounding.

(5) Includes consumption in all blast furnaces producing pig iron.

(6) Includes scrap and pig iron processed in metallurgical blast cupolas and used in oxygen converters.

Source: U.S. Bureau of Mines.

TABLE 2A

TOTAL NON-HOME SCRAP CONSUMPTION

(thousand short tons)

Year	Domestic	Export	Import	Total
1951	37,881	245	416	38,542
1952	34,184	351	153	34,688
1953	35,439	309	173	35,921
1954	23,394	1,679	239	25,312
1955	35,735	5,129	228	41,092
1956	36,845	6,340	255	43,440
1957	31,086	6,765	238	38,089
1958	23,291	2,927	332	26,550
1959	29,043	4,939	309	34,291
1960	26,095	8,039	179	34,313
1961	25,305	9,195	270	34,770
1962	25,284	5,195	264	30,743
1963	29,432	6,368	217	36,017
1964	31,831	7,881	291	40,003
1965	35,804	6,174	212	42,190
1966	36,671	5,827	407	42,905
1967	32,654	7,504	229	40,387
1968	33,587	6,565	294	40,446
1969	36,929	9,035	346	46,310
1970	39,668	10,113	302	50,083

Source: Institute of Scrap Iron and Steel Yearbook

TABLE 3

RECEIPTS, PRODUCTION, CONSUMPTION, SHIPMENTS AND STOCKS OF IRON AND STEEL SCRAP AND PIG IRON, BY TYPE OF MANUFACTURER, IN 1969

(thousand short tons)

	Manufacturers of steel ingots and castings (1)	Manufacturers of steel castings (2)	Iron foundries and miscellaneous users	Total
Scrap				
Receipts	31,972	2,219	9,488	43,679
Production	49,257	1,216	5,814	56,287
Consumption	76,641	3,342	14,833	94,816
Shipments	6,078	174	498	6,750
Stocks Dec. 31	5,413	270	869	6,552
Pig Iron				
Receipts	5,128	109	3,712	8,949
Production	93,567	-	-	93,567
Consumption	90,761	113	3,761	94,635
Shipments	8,327	2	2	8,331
Stocks Dec. 31	1,467	16	240	1,723

(1) Includes only those castings made by companies producing steel ingots.

(2) Excludes companies that produce both steel ingots and castings.

Source: U.S. Bureau of Mines.

TABLE 4

STOCKS OF IRON AND STEEL SCRAP AND PIG IRON AT MAJOR CONSUMING INDUSTRIES' PLANTS DEC. 31

(thousand short tons)

Year	Manufacturers of steel ingots and castings	Manufacturers of steel castings	Iron foundries and miscellaneous users	Total
Scrap Stocks				
1968	6,691	346	845	7,882
1969	5,413	270	869	6,552
Pig Iron Stocks				
1968	2,028	22	292	2,342
1969	1,467	16	240	1,723

Source: U.S. Bureau of Mines.

TABLE 5

COMPOSITE SCRAP STEEL PRICES[1]

(dollars per gross ton)

	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec	Aver	Low Month	High Month	Greatest Difference Between Months	Widest Spread Between Consecutive Months	Narrowest Spread Between Consecutive Months
1955	35.67	36.15	37.05	36.19	36.50	36.53	38.88	42.75	43.56	44.46	45.06	48.26	39.75	33.67	49.26	15.62	4.20	.03
1956	51.81	48.57	49.03	54.41	50.86	45.28	44.33	54.94	58.34	56.39	60.40	64.97	53.65	45.28	64.97	19.69	8.61	.46
1957	59.74	53.35	50.12	43.55	45.51	54.15	54.57	53.54	46.40	38.05	33.13	33.06	47.10	33.06	59.74	26.68	8.66	.07
1958	34.26	36.75	35.95	33.42	33.01	35.28	37.36	42.09	42.41	42.10	41.38	39.78	37.81	33.01	42.41	9.40	4.79	.31
1959	40.52	42.28	38.99	35.21	33.70	35.64	38.43	38.09	39.68	43.19	44.70	41.81	39.69	33.70	44.70	11.00	3.78	.34
1960	40.07	39.49	34.46	33.98	33.27	31.36	31.52	32.44	31.85	29.90	28.71	29.10	33.20	28.71	40.07	11.36	5.23	.16
1961	31.76	33.69	37.52	38.67	36.38	37.73	37.02	38.14	39.85	38.44	32.90	34.32	36.37	31.76	39.85	8.09	5.56	.71
1962	37.82	35.74	32.25	30.80	26.56	24.79	25.07	27.04	26.22	24.64	23.66	23.74	28.54	23.66	37.82	14.16	4.44	.28
1963	26.65	27.66	27.56	28.27	28.71	25.62	25.29	26.14	26.83	26.78	26.46	26.62	26.89	25.29	28.71	3.42	3.09	.10
1964	28.95	28.64	28.87	31.04	31.40	32.77	34.32	37.61	35.92	36.46	37.44	38.53	34.59	28.64	38.53	9.89	5.29	.23
1965	37.86	36.92	37.05	37.41	36.89	34.71	34.43	33.49	30.48	29.54	30.19	32.32	34.27	29.54	37.86	8.32	3.31	.26
1966	33.88	35.05	34.53	31.11	29.86	29.29	30.44	29.83	28.83	28.77	28.50	27.65	30.44	27.65	35.05	7.30	3.43	.06
1967	27.72	27.59	28.39	26.72	26.66	27.00	26.94	27.50	28.23	26.96	28.05	29.80	27.63	26.66	29.80	3.14	1.75	.06
1968	31.62	31.55	29.07	26.88	25.23	23.60	23.30	23.11	23.66	23.29	24.48	25.29	25.94	23.11	31.62	8.51	2.68	.07
1969	26.68	28.11	26.86	26.33	29.12	29.58	29.97	33.02	34.99	33.75	32.91	33.36	30.56	26.33	35.36	9.03	5.05	.36
1970	40.43	44.04	44.37	40.95	43.97	43.72	40.75	40.40	43.76	40.37	35.95	36.31	41.25	35.95	44.04	10.09	5.50	.32

(1) Composite averages of No. 1 heavy melting steel scrap prices at Pittsburgh, Philadelphia and Chicago, compiled from monthly averages published by American Metal Market.

Source: Metal Statistics, 1971.

TABLE 3

COMPOSITE SCRAP STEEL PRICES[1]

(dollars per gross ton)

	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Annr.	Low Month	High Month	Greatest Difference Between Months	Widest Spread Between Consecutive Months	Narrowest Spread Between Consecutive Months
1955	33.67	36.13	37.05	36.19	34.50	34.53	38.88	42.75	43.56	44.44	45.06	40.26	39.75	33.67	49.26	15.62	4.20	.03
1956	51.81	48.57	48.83	54.41	50.84	45.38	46.33	54.94	58.24	56.39	60.40	64.97	53.45	45.28	64.97	19.69	8.41	.46
1957	59.74	53.35	50.12	45.55	43.51	54.15	54.57	53.54	46.40	38.05	33.13	33.04	47.10	33.04	59.74	26.68	8.64	.07
1958	34.26	34.75	35.95	33.42	33.01	35.28	37.30	42.09	42.41	42.18	41.38	39.78	37.81	33.01	42.41	9.40	4.79	.31
1959	40.52	42.28	38.99	35.21	33.70	35.44	38.43	38.09	39.68	43.19	44.78	41.81	37.66	33.70	44.78	11.08	3.78	.34
1960	40.07	39.49	34.44	33.98	33.27	31.34	31.32	32.44	31.85	29.98	28.71	29.16	33.28	28.71	40.07	11.36	3.23	.16
1961	31.76	33.69	37.52	36.67	36.36	37.73	37.82	38.14	39.85	38.44	37.98	34.32	36.37	31.76	39.85	8.09	5.54	.71
1962	37.82	35.74	32.25	30.88	26.36	26.79	25.87	27.04	26.22	24.64	23.66	25.74	28.34	23.66	37.82	14.16	4.44	.38
1963	26.65	27.66	27.56	28.37	28.71	25.62	25.79	26.14	26.83	26.78	26.46	26.82	26.89	25.29	28.71	3.42	3.09	.10
1964	28.95	28.64	28.87	31.04	31.40	32.77	34.32	37.61	35.92	36.46	37.44	38.53	34.50	28.64	38.53	9.89	3.29	.23
1965	37.86	36.93	37.05	37.41	36.89	34.71	34.45	33.69	30.48	29.54	30.19	32.22	34.27	29.54	37.86	8.32	3.21	.26
1966	33.88	35.05	34.53	31.11	29.84	29.29	30.44	29.83	28.83	28.77	26.50	27.85	30.44	27.85	35.05	7.20	3.42	.06
1967	27.72	27.59	28.39	26.72	26.66	27.88	26.94	27.50	26.23	26.94	28.05	29.80	27.63	26.66	29.80	3.14	1.75	.06
1968	31.63	31.55	29.07	26.68	25.23	23.60	23.20	23.11	23.66	23.29	24.48	25.29	25.94	23.11	31.63	8.51	2.48	.07
1969	26.68	28.11	26.84	26.33	29.13	29.58	29.97	33.02	34.99	33.75	32.91	35.36	30.56	26.33	35.36	9.03	3.05	.38
1970	40.45	40.84	44.37	40.68	43.97	43.72	40.75	40.40	43.76	40.37	35.85	36.51	41.25	35.85	44.84	10.00	3.39	.37

(1) Composite averages of No. 1 heavy melting steel scrap prices at Pittsburgh, Philadelphia and Chicago, compiled from monthly averages published by American Metal Market.

Source: Metal Statistics, 1971.

TABLE 6

PRICES OF NO. 1 AND NO. 2 HEAVY MELTING STEEL SCRAP

IN PITTSBURGH AND DIFFERENTIAL, 1954-1970

(dollars per gross ton)

Year	No. 1	No. 2	Differential (No. 1 minus No. 2)
1954	29.85	26.95	2.91
1955	40.21	36.71	3.50
1956	53.39	47.50	5.89
1957	48.54	42.80	5.74
1958	38.10	32.20	5.90
1959	40.11	35.00	5.11
1960	32.87	27.52	5.35
1961	35.22	28.06	7.16
1962	29.28	23.38	5.90
1963	26.93	22.81	4.12
1964	34.75	28.21	6.54
1965	35.10	30.57	4.53
1966	30.72	27.97	2.75
1967	26.95	25.09	1.86
1968	27.21	23.85	3.36
1969	31.61	28.67	2.94
1970	42.18	36.96	5.22

Source: Metal Statistics, 1971.

TABLE 7

COMPOSITE PIG IRON PRICE--MONTHLY AVERAGES[1]

	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec	Aver
1948	40.28	40.63	40.63	40.63	40.97	41.29	43.26	45.32	45.44	47.00	47.59	47.59	43.38
1949	47.65	47.67	47.67	47.55	46.62	46.62	46.62	46.62	46.68	46.68	46.68	46.68	46.98
1950	46.68	46.85	47.28	47.28	47.28	47.28	47.28	47.48	47.95	49.87	50.53	53.19	48.24
1951	53.58	53.58	53.58	53.61	53.61	53.61	53.61	53.62	53.67	53.67	53.67	53.67	53.62
1952	53.67	53.67	53.67	53.67	53.80	53.81	54.26	56.31	56.31	56.31	56.31	56.31	54.84
1953	54.73	54.73	54.73	54.73	54.73	54.80	56.22	56.23	56.10	56.03	56.03	56.03	55.12
1954	56.03	56.03	56.03	56.03	56.03	56.03	56.03	56.03	56.03	56.03	56.03	56.03	56.03
1955	56.03	56.03	56.03	56.03	56.03	56.03	57.88	58.45	58.45	58.45	58.45	58.45	57.20
1956	58.45	58.45	58.59	59.65	59.65	59.65	61.08	62.35	62.45	62.45	62.43	62.45	60.64
1957	62.45	62.45	63.84	64.05	64.05	64.05	65.23	65.95	65.95	65.95	65.95	65.95	63.82
1958-61	65.95	65.95	65.95	65.95	65.95	65.95	65.95	65.95	65.95	65.95	65.95	65.95	65.95
1962	65.95	65.95	65.95	65.95	65.95	65.95	65.95	65.95	65.95	65.95	63.08	62.95	65.46
1963	62.95	62.95	62.95	62.95	62.95	62.95	62.95	62.75	62.75	62.75	62.75	62.75	62.87
1964-5	62.75	62.75	62.75	62.75	62.75	62.75	62.75	62.75	62.75	62.75	62.75	62.75	62.75
1966	62.75	62.75	62.75	62.75	62.75	62.75	62.75	62.75	62.75	62.75	62.70	62.70	62.74
1967-68	62.70	62.70	62.70	62.70	62.70	62.70	62.70	62.70	62.70	62.70	62.70	62.70	62.70
1969	62.70	62.70	62.70	62.70	62.70	62.70	63.15	65.20	65.20	65.20	65.20	65.20	63.78
1970	65.20	65.20	66.78	68.20	68.20	68.20	68.20	68.20	72.65	73.70	73.70	73.70	69.33

(1) Averaged from quotations published in American Metal Market.

Source: Metal Statistics, 1971.

TABLE 8

PROPORTION OF IRON AND STEEL SCRAP AND PIG IRON* USED IN 1969
(percent)

Type of Furnace	Scrap	Pig Iron
Basic oxygen converter	29.9	70.1
Open hearth furnace	45.1	54.9
Electric furnace	98.6	1.4
Cupola furnace	83.7	16.3

* Includes hot metal.

Source: U.S. Bureau of Mines

TABLE 9

RAW STEEL PRODUCTION

(thousands of net tons)

Years	Open Hearth	Bessemer	Basic Oxygen Process	Electric	Total
1954	80,328	2,548	—	5,436	88,312
1955	105,359	3,320	307	8,050	117,036
1956	102,841	3,228	506	8,641	115,216
1957	101,658	2,475	611	7,971	112,715
1958	75,880	1,396	1,323	6,656	85,255
1959	81,669	1,380	1,864	8,533	93,446
1960	86,368	1,189	3,346	8,379	99,282
1961	84,502	881	3,967	8,664	98,014
1962	82,937	805	5,553	9,013	98,328
1963	88,834	963	3,344	10,920	109,261
1964	98,098	858	15,442	12,678	127,076
1965	94,193	586	22,879	13,804	131,462
1966	85,025	278	33,928	14,870	134,101
1967	70,690	*	41,434	15,089	127,213
1968	65,836	*	48,812	16,814	131,462
1969	60,834	*	60,236	20,132	141,262
1970	48,022	*	63,330	20,162	131,514

* Included with open hearth.

Source: AISI

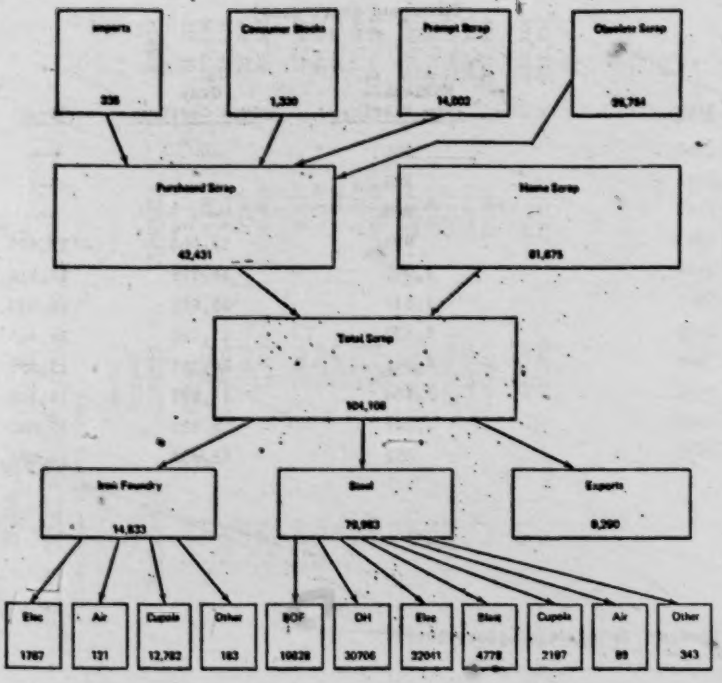
TABLE 10

SHIPMENTS OF IRON CASTINGS

(thousand short tons)

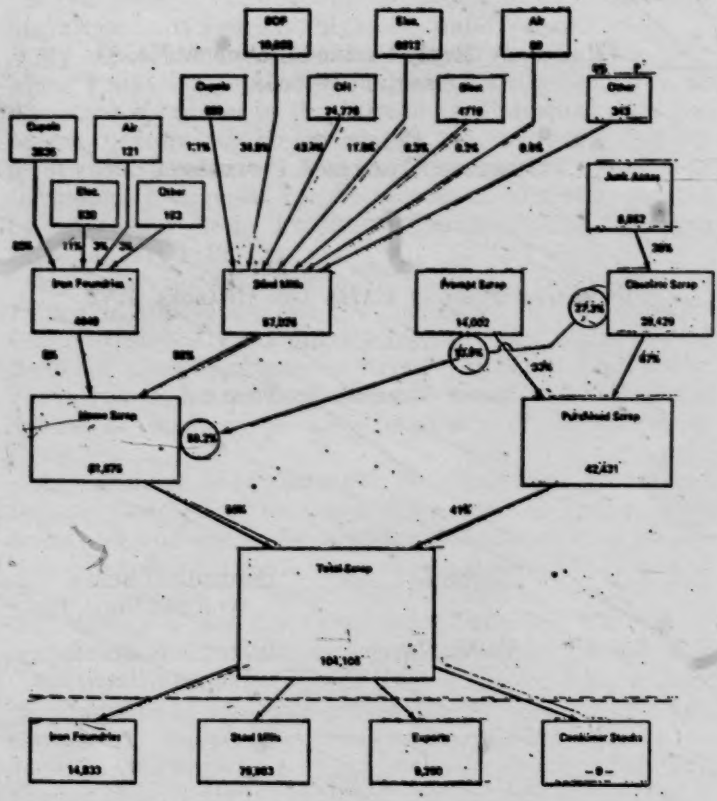
Year	Malleable Iron Castings	Gray Iron Castings	Total
1960	821	—	—
1961	723	—	—
1962	868	—	—
1963	933	12,764	13,697
1964	1,001	14,315	15,316
1965	1,137	15,696	16,833
1966	1,132	15,713	16,845
1967	1,041	14,315	15,356
1968	1,108	15,072	16,180
1969	1,149	15,935	17,084
1970	852	13,954	14,806

Source: Metal Statistics, 1971



Source: Arthur D. Little, Inc., estimates.

FIGURE 1 NET FLOW OF SCRAP TO END USES, 1969
(Thousands of Short Tons)



*Source: Arthur D. Little, Inc., estimates.

FIGURE 2 SCRAP SOURCES, 1969
(Thousands of Short Tons)

[Railroads' Reply Verified Statement No. 80
Affiant: F. Wascoe]

Before the
INTERSTATE COMMERCE COMMISSION

EX PARTE NO. 281
INCREASED FREIGHT RATES AND CHARGES, 1972

REPLY VERIFIED STATEMENT

OF

F. WASCOE

IN REPLY TO

V.S. 335	Herschel Cutler	Institute of Scrap Iron and Steel, Inc.
V.S. 335-A	T. M. Barnes	Institute of Scrap Iron and Steel, Inc.

IRON OR STEEL SCRAP

April 10, 1972

My name is F. Wascoe. I am Manager of the Bureau of Transportation Research of the Southern Pacific Transportation Company, with headquarters at One Market Street, San Francisco, California 94105.

As Manager of the Bureau of Transportation Research, a part of the Executive Department, I supervise and participate in economic, operating, cost and statistical analyses related to transportation matters for presentation to the management of Southern Pacific and to various regulatory

bodies including the Interstate Commerce Commission. These studies, to various degrees, involve all forms of transportation, be it railroad, highway, water or air.

My experience in these matters dates back to June 1948 when I was employed by Southern Pacific Company as Assistant Engineer in the Bureau of Transportation Research. Except for six months in the Operating Department as switchman and Assistant Trainmaster I have been continuously engaged in transportation analysis. I have been Manager of the Bureau of Transportation Research since January 1, 1957.

My educational background includes two years at Princeton University and the equivalent of two years at Cornell University culminating in the receipt of the degree BofS in Civil Engineering from Princeton University. Furthermore, I have completed two years in the Graduate School of Business at the University of California at Berkeley.

Any attempt to compare the reasonableness of rate or revenue factors for two commodities, such as iron or steel scrap and iron ore, without giving consideration to all the factors which influence the respective rates cannot be viewed as valid. Among the factors which should be considered in determining a rate are those which influence the cost of service incurred in transporting the given commodity.

Cost of railroad service is very complex, with a very large number of variables influencing the cost of providing a given railroad service. Some factors having a strong influence on the cost of providing such service are net weight, number of carloads per shipment and distance a shipment is hauled. The following are comparisons of such factors for iron or steel scrap and iron ore as developed from Statement TD-1-Carload Waybill Statistics—1969—One Percent Sample of Termination in the Year 1969—Department of Transportation—September 1971 with comments on the influence each factor has on the cost of service.

Net Weight

Many categories of railroad costs are independent of the weight of a shipment. For example, in preparing a waybill for a 10-ton shipment vs. a 100-ton shipment, the cost will be the same per waybill but the cost per ton for the 10-ton shipment will be 10 times the cost per ton for a 100-ton

shipment. Based on observation of railroad cost behavior, a rough rule of thumb is, assuming all other cost factors remain the same, that for every 10% increase in the weight of a given shipment, transportation costs will increase approximately 3%. This translates as follows:

Tons	Cost Per Carload	Cost Per Ton
50 T	$100	$2.00
75 T	115	1.53

The following are the average loads per car load for iron or steel scrap and iron ore:

Territorial Movement	Iron or Steel Scrap (Commodity 40211)	Iron Ore (Commodity 101)
US to US	54.6 tons	76.3 tons
Off to Off	55.5 tons	77.5 tons
Sou to Sou	53.9 tons	82.0 tons
WTL to WTL	55.1 tons	73.4 tons
SW to SW	58.9 tons	71.3 tons
MTP to MTP	47.8 tons	100.8 tons

Distance Hauled

Distance, like weight, has a significant influence on railroad costs. Obviously, as distance increases, costs increase but not proportionately. This is due to the fact that each shipment must incur terminal costs associated with origination and termination of the shipment which are independent of the distance the shipment is moved. For example, given a 50-ton carload with terminal costs of $50 each to originate and terminate and a hauling cost of 50¢ per mile the following obtains:

	Cost				
Distance	Terminal	Line-haul	Total	Ton Miles	Cost Per Ton-Mile
150 miles	$100	$75	$175	7,500	2.33¢
250 miles	100	125	225	12,500	1.80¢

The following are the average miles per ton for iron or steel scrap and iron ore:

Territorial Movement	Iron Ore (Commodity 101)	Iron or Steel Scrap (Commodity 40211)
US to US	247 miles	150 miles
Off to Off	188 miles	106 miles
Sou to Sou	170 miles	166 miles
WTL to WTL	274 miles	244 miles
SW to SW	310 miles	236 miles
MTP to MTP	239 miles	150 miles

Carloads Per Shipment

As may be noted above, the average haul for iron ore at 247 miles and iron and steel scrap at 150 miles both are substantially shorter than the average haul for all carload traffic which is 387 miles. In the above example of cost behaviour with length of haul it is readily apparent that the shorter the haul the greater the impact of terminal costs on total costs. (In the example, at 150 miles, terminal costs are 57% of total cost while at 250 miles terminal costs are about 45% of total costs.) Switching costs are a substantial proportion of terminal costs. Therefore, traffic movements which involve loading or unloading of many carloads per day will have much lower switching minutes and costs per car than traffic movements which originate or terminate only one car per day. Typically, iron ore is handled in large volumes and frequently in trainload quantities of 100 or more cars; iron or steel scrap, which may be originated or terminated in multiple-car cuts is frequently moved at the rate of a single car per day. The 1% Waybill data for the two commodities are as follows:

	Iron or Steel Scrap (Commodity 40211)		
	Sample Size (Waybills)	Carloads	Carloads Per Waybill
US to US	994	5,270	5.3
Off to Off	712	3,625	5.1
Sou to Sou	70	470	6.7
WTL to WTL	37	185	5.0
SW to SW	52	260	5.0
MTP to MTP	97	585	6.0

Iron Ore

(Commodity 101)

	Sample Size (Waybills)	Carloads	Carloads Per Waybill
US to US	266	19,150	72.0
Off to Off	86	4,550	53.0
Sou to Sou	8	500	62.5
WTL to WTL	140	12,350	88.2
SW to SW	3	150	50.0
MTP to MTP	17	1,050	61.8

Equipment Utilization

Another factor which has a significant impact on costs is equipment utilization. As a measure of the comparative utilization of cars in iron ore service and cars in scrap service, the following has been developed for Southern Pacific Transportation Co.:

Comparison of Utilization of Car Pools Handling Iron Ore and Handling Scrap

	Average Carloads Per Month				
	Iron Ore	Scrap Cars			
	Pool 64201 (575-600 Cars)	Pool 59401 (About 40 Cars)	Pool 59421 (About 150 Cars)	Pool 59431 (About 1000 Cars)	Pool 9601 (About 200 Cars)
Jan. 1971	6.28	.18	.44	.47	.51
Feb. 1971	5.55	.54	.62	.65	.65
Mar. 1971	8.90	.78	.73	.91	1.08
Apr. 1971	7.68	.63	.58	.72	.93
May 1971	6.98	.47	.59	.61	.69
Jun. 1971	7.15	.53	.68	.80	.80

The above are derived from regularly maintained computer records of the SPT Co. The cars in Pool 64201 are almost 100% dedicated to the movement of iron ore. The cars in Pools 59401, 59421, 59431 and 59601 are primarily devoted to scrap traffic. The pools were selected because a high proportion of loads applied to cars in these pools, i.e. more than 75%, consisted of iron or steel scrap.

VERIFICATION

STATE OF CALIFORNIA
CITY OF SAN FRANCISCO

F. Wascoe, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

/s/ F. Wascoe
F. WASCOE

Subscribed and sworn to before me this 30th day of March, 1972.

/s/ Peter G. Zuvela
Notary Public of San Francisco

PETER G. ZUVELA
Notary Public—California
Principal Place of Business in
City and County of
San Francisco

My commission expires .....

[Railroads' Reply Verified Statement No. 89
Affiant: William J. Bolch]

Before the
INTERSTATE COMMERCE COMMISSION

EX PARTE NO. 281
INCREASED FREIGHT RATES AND CHARGES, 1972

REPLY VERIFIED STATEMENT OF

WILLIAM J. BOLCH

IN REPLY TO

VERIFIED STATEMENT VS-376—NATIONAL ASSOCIATION OF SECONDARY MATERIALS INDUSTRIES, INC.

NON-FERROUS METAL AND ALLOY SCRAP

April 10, 1972

My name is William J. Bolch. I am Assistant Chairman of the General Freight Traffic Committee-Eastern Railroads, with headquarters at Two Pennsylvania Plaza, New York, N.Y. 10001. I have been engaged in the handling of rate and traffic work for the railroad industry in the East for more than 27 years.

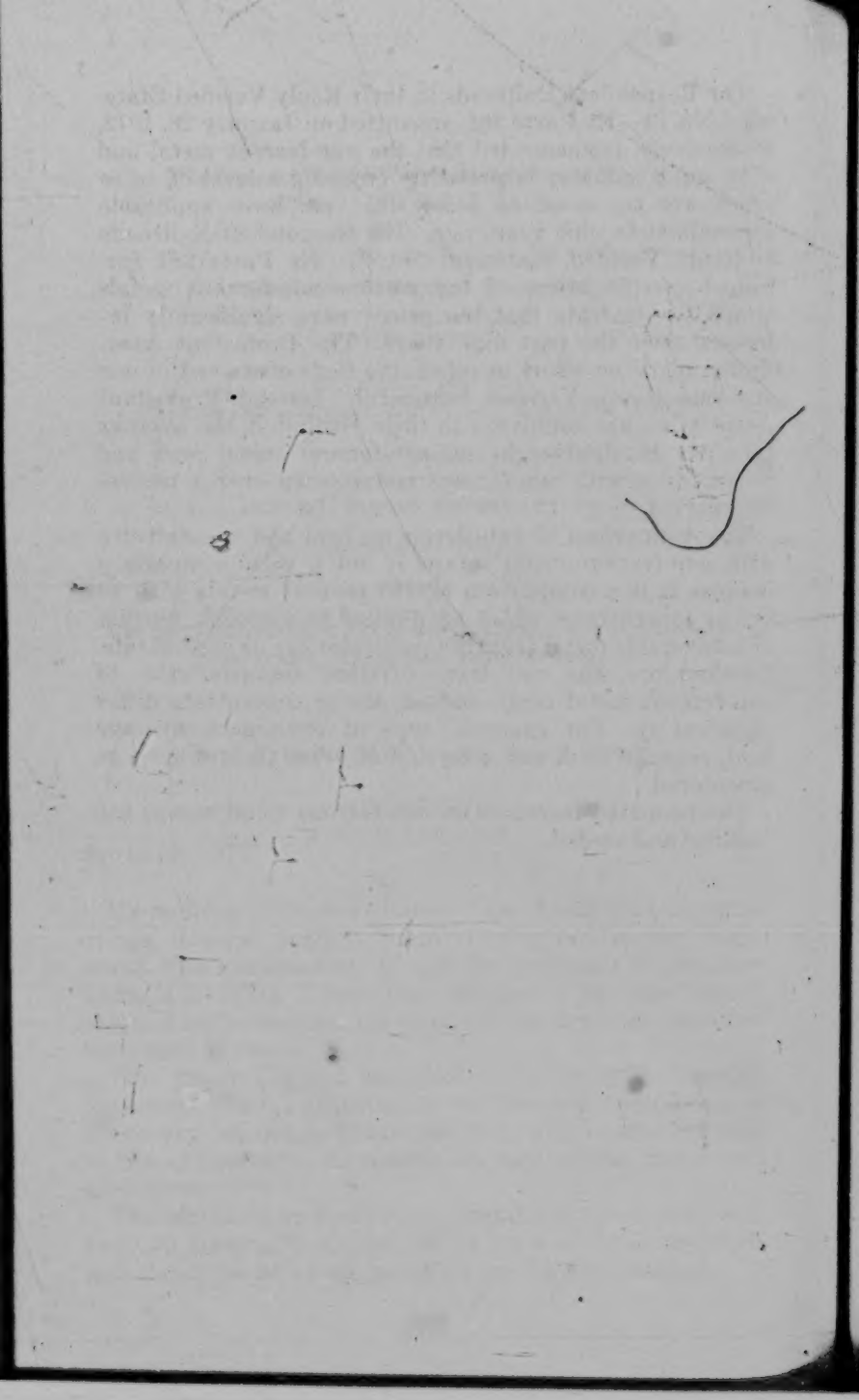
This Reply Verified Statement is in reply to Verified Statement V-376, submitted by the National Association of Secondary Materials Industries, Inc., and relates entirely to the protestant's statements on non-ferrous metal and alloy scrap.

The increases on non-ferrous metal and alloy scrap will have no discernible impact on the price of these materials and therefore will have no effect on the environment.

The Respondent Railroads in their Reply Verified Statement No. 31—Ex Parte 281, submitted on January 28, 1972, conclusively demonstrated that the non-ferrous metal and alloy scrap industry is presently enjoying a level of rates which are the same or below the rate level applicable approximately nine years ago. The Respondent Railroads in Reply Verified Statement No. 31—Ex Parte 281 furnished specific prices of the various non-ferrous metals scraps to illustrate that the prices were significantly increased over the past nine years. The Protestant Association made no effort to refute the facts contained in our previous Reply Verified Statement. Instead Protestant Association has compared in their Exhibit A the average rate per hundredweight on non-ferrous metal ores and concentrates with non-ferrous metal scrap over a twelve-year period.

The comparison of rate levels on ores and concentrates with non-ferrous metal scraps is not a valid comparison because it is a comparison of 100 percent metals with an ore or concentrates which are limited to a specific percent of recoverable metal from the particular ore or concentrate. Furthermore, the rail transportation characteristics of non-ferrous metal scrap and an ore or concentrate differ significantly. For example, type of equipment, average load, average haul, and a myriad of other factors must be considered.

The proposed increases on non-ferrous metal scraps are justified and needed.



VERIFICATION

DISTRICT OF COLUMBIA,
CITY OF WASHINGTON. } ss:

WILLIAM J. BOLCH, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

/s/ William J. Bolch

Subscribed and sworn to before me this 7th day of April 1972:

/s/ Ellen M. Herlihy
ELLEN M. HERLIHY

Notary Public of the District of Columbia. My Commission expires February 28, 1977.

EXECUTIVE OFFICE OF THE PRESIDENT,
COUNCIL ON ENVIRONMENTAL QUALITY,
Washington, D.C., October 30, 1972.

Hon. GEORGE M. STAFFORD,
Chairman, Interstate Commerce Commission,
Washington, D.C.

DEAR MR. STAFFORD: As you are aware, the Council on Environmental Quality has on several occasions expressed its interest in the investigations under way in *Ex Parte 281, Increased Freight Rates and Charges, 1972.* In part, our concern has been a procedural one, designed to ensure that the Commission adopts adequate procedures for integrating the requirements of the National Environmental Policy Act (NEPA) with your Commission's regulatory proceedings, as outlined in Mr. Atkeson's letter to you of January 31, 1972. We have been equally concerned, however, with the substantive questions

involved in assessing the impact of freight rate increases on recycling and the environment as indicated in Mr. Atkeson's letter of January 17, 1972. I have also expressed on previous occasions the Council's concern that across-the-board percentage freight rate increases widen existing differentials between virgin and secondary materials, thus reducing the level of recycling to a point below that which would have been obtained in the absence of a rate increase.

In a document in the *Ex Parte 281* proceedings, entitled "Environmental Impact Statement" and dated March 1, 1972, the Commission seemed to recognize both these substantive and procedural concerns by referring to my observation concerning across-the-board percentage increases and by noting that further investigation would have to be carried out in order "to assess with any certainty the environmental impact of" the Commission's proposed action. Given the Commission's apparent recognition at that time of the potential for environmental impact, we assumed, as noted in our letter of April 6, 1972, that the vehicle for carrying out the required assessment would be the environmental impact statement procedures of Sec. 102 (2)(C) of the National Environmental Policy Act, as further defined and clarified in the CEQ guidelines.

In view of this background, our concern is increased by the Commission's recent report of October 4, 1972, approving certain selective freight rate increases in *Ex Parte 281*, including rate increases on recycled materials, and concluding that such action "will neither actually nor potentially significantly affect the quality of the human environment." Since the Commission has thus apparently determined that *Ex Parte 281* is not after all the appropriate vehicle for responding to the concerns mentioned above, we make the following comments.

The National Environmental Policy Act has placed supplemental responsibilities on all Federal agencies, requiring new allocations of manpower and resources in order to carry out the environmental assessments required by the Act. For the most part, we think Federal agencies have responded to the challenge of NEPA and have undertaken the affirmative duty to assess the environmental impact of proposed actions in the manner contemplated by the Act. Thus, wholly apart from the validity of the Commission's conclusion concerning the environmental impact of its action in *Ex Parte 281*, we are disturbed by the repeated references throughout the report to the

Commission's inability similarly to adapt to the requirements of NEPA. If manpower problems are preventing effective implementation of the Act, we would have expected the Commission to be alert to this problem earlier. With almost three years having elapsed after the passage of NEPA, lack of resources no longer appear to us to justify—if ever they did—less than full compliance with the policies and procedures of NEPA, designed as they were to give content to an expressly announced commitment of this country to the protection of environmental values.

The Council recognizes that the decision whether or not an action falls within the scope of Sec. 102(2)(C) of NEPA must ultimately be made by the agency proposing to take the action. Nevertheless, the conclusion that the Commission's action in *Ex Parte 281* will have no significant environmental impact seems unresponsive to the language of our NEPA guidelines (Sec. 5(b), 36 F.R. 7724):

> (b) The statutory clause "major Federal actions significantly affecting the quality of the human environment" is to be construed by agencies with a view to the overall, cumulative impact of the action proposed (and of further actions contemplated) * * * Proposed actions, the environmental effect of which is likely to be highly controversial, should be covered in all cases. * * *"

It is understandable that difficulties will be encountered in quantifying the environmental consequences of an incremental freight rate increase on recyclable materials. In our view, however, these consequences must be assessed in the light of the rate disparity between secondary and primary materials that gives rise to the problem in the first place. This disparity is a matter of an entirely different magnitude, calling for a thorough environmental assessment as a precondition to determining whether subsequent incremental increases require additional environmental impact statements.

Apparently the Commission is prepared in part to agree with this conclusion in light of its statement that "we currently have under way a comprehensive investigation in *Ex Parte No. 270, Investigation of Railroad Freight Rate Structure*, 340 I.C.C. 868, a proceeding which was instituted by us in recognition of the growing concern regarding the pricing of railroad services."

In our view, the environmental problem presented by *Ex Parte 281* is one of determining the appropriate response to the claimed need for additional revenue, pending completion of the basic investigation by which the environmental impact of approving that claim and all future demands for increases is to be determined. Clearly at some point increases which might be individually "insignificant" become cumulatively "significant." In addition, the claim that freight rates on recycled products must be increased to respond to "emergency" revenue needs pending completion of the required, overall environmental evaluation, loses much of its force as months turn into years and the basic investigation remains uncompleted. Finally, even the "emergency" argument itself, however legitimate, in no way forecloses the consideration of alternatives which would both meet revenue needs and at the same time avoid further potential environmental damage while the basic rate structure issue is being resolved. Alternatives of this sort were, in fact, suggested in the partial dissenting opinions of Commissioners Brown and Deason (who would have denied approval of increases for recyclable commodities), with no indication in the Commission's majority report that such measures would not have been sufficient to meet the revenue needs relied on to justify the rate increases.

In view of these considerations, we think it reasonable to expect that the investigation alluded to in *Ex Parte 270* should be completed—together with draft and final environmental impact statements—before the Commission acts to grant an incremental rate increase affecting materials to be recycled as is proposed in *Ex Parte 281*. We would also appreciate advice as to your plans to complete an environmental impact statement and the progress the Commission (or its staff) has made to date in connection with the basic investigation in *Ex Parte 270*.

We would also like to take this opportunity to express some of the questions our staff has raised with respect to the analysis and logic relied on by the Commission in its October 4 report on *Ex Parte 281*. With respect to secondary materials generally, we note that the Commission proposes to limit rate increases not to exceed three percent on the grounds that "this limitation will have a beneficial effect upon the environment." This concession adds to our question about the Commission's conclusion that it need not prepare an environmental impact statement on its action and raises serious doubts concerning the Commission's

conclusion that similar beneficial environmental effects would not result from a limitation on scrap iron rates. It appears to us that the Commission's analysis provides an inadequate basis for determining the environmental effects of *Ex Parte 281* and that many of the problems in undertaking an environmental impact analysis of the basic rate structure in *Ex Parte 270* will be similar to those involved in *Ex Parte 281*. Accordingly, I am attaching an analysis prepared by our staff which discusses some of these problems with respect to the environmental effects of the rate increases on scrap iron and steel.

In summary, the Council feels that the basic environmental issues related to the existing freight rate structure and changes thereto, must be evaluated in a logical, analytical and timely fashion in compliance with the requirements of the National Environmental Policy Act. The Commission's actions to date appear to be inconsistent with the objectives of NEPA, and the analyses undertaken to date by the Commission appear to offer an inadequate basis from which to draw conclusions concerning the impact of freight rates on recycling and environmental quality. Our staff is available to discuss the NEPA procedural issues as well as to assist in structuring the analytical work required to assess adequately the environmental impact of freight rates.

Sincerely,

RUSSELL E. TRAIN,
Chairman.

Attachment.

ATTACHMENT

The Commission has found that ferrous scrap does not directly and specifically compete with iron ore in the manufacture of steel to the extent that they require similar rate treatment. This finding is valid only in a narrow, technical sense and appears unproductive as an approach to the environmental questions at issue. There can be no argument that the basic metallic inputs to the steelmaking process originate from either virgin or secondary sources. The distinction drawn by the Commission between raw iron ore and concentrated iron pellets is immaterial from an environmental viewpoint. Regardless of which form it is transported in, if the cost of virgin iron is held down relative to that of scrap because of an arbitrarily favorable freight rate differential, steel makers will substitute virgin material for scrap.

In the very short run, of course, the degree of substitution is constrained by the technology of existing plants. In particular, we recognize that today's most important steelmaking process, the basic oxygen furnace, can accept only limited proportions of scrap. But even within these limits, marginal decisions on scrap usage are bound to be determined by the relative cost differential between iron ore and scrap. This presumption is supported by a study soon to be published by the U.S. Bureau of Mines.[1] While its quantitative findings are at best tentative, this report lends no support to the ICC position.

As the time horizon is broadened, the competitive picture becomes even more clear-cut. Scrap and ore are in direct competition whenever a choice must be made between BOF and electric arc facilities. And in the long run, as alternatives are examined regarding the construction of new capacity, the relative costs of the raw material requirements—ore and scrap—become even more critical.

The ICC acknowledges this fact when it says:

> The replacement of the open hearth by the basic oxygen process has resulted primarily in lower domestic demand for scrap and in increasing availability of scrap for export. The increased availability of scrap has to some extent contributed to the growth of electric arc furnaces.[2]

Unfortunately, the Commission neglects to consider this effect in its final decision. The environmental implications of long-run investment decisions in the steel industry extend beyond the impact of waste recycling alone. Studies by the CEQ indicate that in terms of water and air pollution and energy consumption, electric arc furnaces are much less environmentally harmful than the basic oxygen furnaces. Data summarizing these findings were submitted to the ICC by the Environmental Protection Agency in its letter and were largely ignored in the Commission's report.

We also take exception with the Commission's conclusion that freight rates have no significant effect on the price of scrap and thus on the quantity consumed. The analysis presented purports to show that since the price of scrap fluctuates

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[1] *An Economic Analysis of the Junk Automobile Problem.* Robert Lewis Adams.

[2] Page 406, Ex Parte No. 281.

widely in the short run and since these fluctuations seem to have no direct relationship to changes in freight rates, rates therefore do not affect price. In actuality scrap prices are determined by a number of factors operating simultaneously, among them are the aggregate demand for steel, the price and transportation costs of iron ore, the supply of scrap, as well as the transportation cost of scrap and other factors. It would be surprising indeed, if, in light of the number of factors constantly at work in the scrap market, a close and simple relationship existed between scrap price movements and freight rate changes.

Nor does data which shows a constantly growing consumption of scrap despite rate increases prove that freight rate decisions are inconsequential. Growth might have been materially higher or lower had a rate decisions been different. What is needed in each instance is a multivariate analysis to isolate the effect of transportation costs on scrap prices and the quantity consumed. It cannot be presumed from the evidence presented that freight effects are insignificant.

ENVIRONMENTAL PROTECTION AGENCY,
Washington, D.C., October, 30, 1972.

Mr. ROBERT L. OSWALD,
Secretary,
Interstate Commerce Commission,
Washington, D.C.

DEAR MR. OSWALD: The Environmental Protection Agency has reviewed Ex Parte 281, *Increased Freight Rates and Charges, 1972*, served on October 4, 1972. In view of the Commission's decision not to file a final environmental impact statement, we have directed our comments to the environmental implications of the proposed rate increases. Our comments concerning the adverse environmental impacts of the proposed increases on secondary materials are contained in the enclosed critique.

EPA regrets that the Commission has chosen not to submit a formal impact statement on its proposed tariff action in Ex Parte 281. Although we are aware that the issues involved are extremely complex and require correspondingly extensive research and analysis, the impact statement process would seem to be an appropriate vehicle for such studies. On-going investigations by this Agency indicate that there is reason to believe

that rate increases on secondary materials may curtail their movement with resultant adverse environmental impacts. We therefore cannot support the Commission's proposed action on rate increases for secondary materials, scrap steel, and returnable containers.

We would look forward to any meetings you may wish to have to discuss these issues; such meetings, we feel would strengthen mutual understanding and perhaps resolve some of the issues raised herein. If we can be of any assistance, please call me at (202)755–0770.

Sincerely,

SHELDON MEYERS,
Director, Office of Federal Activities.

Enclosure.

CRITIQUE

Comments of the Environmental Protection Agency on the ICC Order of October 4, 1972, *Increased Freight Rates and Charges, 1972*, Ex Parte 281.

EPA previously expressed concern over the environmental aspects of the rate increases in response to an earlier draft environmental impact statement on this matter. (EPA letter of April 24, 1972) Our concern continues because of the potential adverse environmental consequences of the action recommended in Ex Parte 281.

In our response to the Commission's draft impact statement on the rate increase, EPA presented environmental impact data showing that negative environmental effects (air pollution, water pollution, waste discharged, and energy and materials consumption) of product manufacture were generally significantly lower for products made from secondary materials than for products made from virgin materials. The crux of the Commission's "no impact" conclusion, however, was that the movement and the use of secondary materials would not be curtailed by the rate increases. The main supporting evidence it presented was that, notwithstanding past increases in freight rates, secondary commodities have continued to move, in some cases in increasing volumes. The fallacy in this reasoning is that many factors other than freight rates affect the price and movement of these commodities; one cannot look at the aggregate effect of all of those variables and conclude that one of them apparently had no effect.

Thus, the historical data presented by the Commission does not support the conclusion that the movement of the commodities will not be affected and that there will be no adverse environmental impact. The fact that, for any commodity considered, the cost to a user is a prime consideration in his decision to use the secondary material as a raw material input, and that freight rates affect the cost to that user, is prima facie evidence that the rates would affect the use of the materials.

The Commission's decision to limit rate increases to 3 percent on all secondary materials except steel was made in contrast to its conclusion that secondary materials "would continue to move despite the proposed increases." Yet, the Commission also reasoned that a "hold-down" on rate increases "should encourage the movement and recycling of the commodities." To simultaneously maintain that rate increases will not affect the movement of secondary materials and that "hold-downs" will encourage movement and recycling is an ambivalent position, indicating that rate increases on secondary materials are arbitrary actions taken in the absence of conclusive environmental analysis. Until conclusive environmental analysis is at hand, EPA believes that the Commission should seriously consider the suspension of rate increases on secondary materials.

The accompanying decision to allow the full rate increase on scrap steel is questioned by EPA since the Commission's conclusion that no environmental impact will ensue is without adequate basis, as explained above. The Commission's point that the increase is a small percentage of the material price does not adequately consider the impact of past increases and the likelihood of future increases for which the current action would serve as a precedent.

The Commission further concluded that "ferrous scrap . . . does not directly compete with iron ore in the steelmaking process" and therefore should not be subject to rate limitations similar to those on iron ore. The Commission earlier recognized, as has been commonly stated by metallurgical experts, that substitution of scrap for ore is possible within certain technological limits in steelmaking furnaces. Also, in terms of long-range investments, steel companies may choose between furnaces based primarily on ore and furnaces based primarily on scrap. Within certain limits, therefore, the steelmaker is free to choose either scrap or ore as a basic raw material for both now and in the future. In terms of potential environmental impacts, then,

freight rates influence the price of the two materials and the steelmaker's choice of which materials to use.

EPA believes that the proposed rate increase on scrap steel should be either eliminated, held to that approved for other secondary materials, or held in parity with iron ore, until conclusive evidence can be presented that no adverse environmental impact would result from the proposed increase.

An additional area of concern to EPA relates to the increase proposed for return shipments of empty containers such as returnable glass bottles. The use of returnable versus nonreturnable bottles has important environmental benefits, as shown in the table attached to this letter. The Commission found that an increase of 10 percent for empty returnable bottles versus 6 percent for new glass bottles was "just and reasonable", and the limitations imposed were "for reasons other than environmental."

Before granting any increase on empty containers being returned, the Commission should determine the potential impacts of this action. Since the attached data give strong indications that the increases will be environmentally damaging, the rate increases should be suspended until an environmental analysis is conducted.

In conclusion, EPA cannot support the Commission's proposed action on rate increases for secondary materials, scrap steel, and returnable containers. Without a conclusive analysis of their environmental impact, the rate increases on these materials should not be implemented until such analysis is completed. As clearly pointed out in NEPA, the Commission must identify alternatives for a proposed action which will not be environmentally damaging.

TOTAL ENVIRONMENTAL IMPACTS OF SELECTED BEVERAGE CONTAINERS
(FOR 1,000 GALLONS OF BEVERAGES)

Category	Returnable glass	1-Way glass	Bi-metal can	Aluminum can
Virgin raw materials (pounds)	1,180	7,900	6,400	2,700
Energy (10^6 B.t.u.)	16	67	49	50
Water (gallons)	[4] 950	6,400	16,000	19,000
Mining waste (pounds)	250	800	3,400	1,100
Atmospheric emmissions (pounds)	150	160	270	320
Waterborne wastes (pounds)	100	78	290	570

[1] Based on 15 trips per bottle, the assumed national average.
[2] Based on 10 oz. bottles.
[3] Based on 12 oz. cans.
[4] Does not include bottle washing.

Source: Midwest Research Institute.

THE ASSISTANT SECRETARY OF COMMERCE

Washington, D.C. 20230

April 12, 1973

Honorable Robert L. Oswald
Secretary of Interstate Commerce
Commission
Washington, D. C. 20423

Dear Mr. Secretary:

The draft environmental impact statement for the administrative action to Increase Freight Rates and Charges (Ex Parte No. 281) was received by the Department of Commerce on March 15, 1973. We have reviewed the draft statement and have the following comments for your consideration.

General. We believe the conclusion cited in the summary sheet and on page 190 of the impact statement that the action taken in this proceeding will not have a significant adverse impact upon the quality of the human environment raises an important question about the purpose of the statement. The National Environmental Policy Act (NEPA) as quoted on page 11 (i.e., Section 102(2)(C)) requires that the statement set forth as fully and clearly as possible precisely what the environmental impact will likely be. Simply giving the Commission's judgment on the issue without in-depth supporting documentation is insufficient. We suggest, accordingly, that the final environmental impact statement give more attention to this issue and less to justifying a contemplated rate-making action.

We recognize the importance of maintaining an efficient and reliable railroad system, but question whether this objective will be jeopardized by holddowns on rail freight rates for secondary materials. It is argued (page 7) that critics of the rate increase have taken a one-dimensional position by stressing only the environmental issue. This does not track with the stress for encouraging recycling as a general national policy—see, e.g., the Presidential

Environmental Message of February 10, 1970 and February 8, 1972. The national concern for conserving limited national resources requires that transportation rates be structured, insofar as possible, so there is no economic disincentive for moving secondary materials.

Rate-Making Considerations. It is not clear why the statement should include a general discussion of classification factors or transportation characteristics (page 17-33), unless it was to reduce or eliminate an unfamiliarity with rate-making in American domestic commerce. If this was the purpose for the discussion, the statement would be strengthened considerably by showing specifically how and to what extent each of the factors listed on page 19 applies to the transport of scrap material.

The analysis should include specific answers to the following questions:

1. What are the loading densities of various scrap materials and how do these densities compare with those of the relevant primary materials? Most of the comparisons in the statement are in terms of pounds per car, but these are relevant only when scrap and primary materials are transported in cars with the same cube and weight capacity. If the statement is to dwell on densities it should give more detail on these comparisons.
2. Compared to primary materials, how susceptible are scrap materials to each of classification factors 2-6 in the list on page 19? For example, is scrap iron and steel more or less liable to damage or susceptible to theft than iron ore and metallurgical coal?
3. What is the value per pound of scrap material in comparison with other (primary) materials? The statement does give some information on the prices of some scrap materials, but it should include more price data and make comparisons with other materials.
4. How do scrap and primary materials compare in terms of the ease or difficulty of loading and unloading? And to what extent do railroads load and unload cars of scrap and primary materials? If shippers and receivers usually load and unload scrap material, how can this factor significantly affect railroad costs to transport scrap material? Instead of, or in addition

to, describing the technology of the various scrap material industries, the statement would be strengthened by comparing the equipment, techniques and methods used in loading, transporting and unloading the several scrap materials with those for the relevant primary materials? The statement also should address similar comparative questions about the remaining rate-making factors listed on page 19.

Demand Elasticity and Environmental Impact. To the extent that the Commission discusses the elasticity of demand and to the extent that it is a critical issue in terms of environmental impact implications, the nature of elasticity should be clarified. For example, the discussion on page 27 might lead one to conclude that demand is elastic; yet the discussion on page 76 may lead one to the conclusion that demand is inelastic. Because of these ambiguities, the general argument concerning elasticity and its importance in justifying the ICC's position requires further clarification.

Apart from this specific point, the economic analysis underlying the conclusions in the statement regarding the environmental impact of the proposal should be strengthened. In particular, the Commission should present in greater detail the cost and demand implications of a rate structure that is designed to favor the shipment of secondary materials by rail. The information that is provided should enable an interested party to determine the relative economic and environmental impact of any particular ICC action.

Conclusion. In general, we believe the policy imperatives of the 1970's require that the Commission focus on evaluating the underlying rate structure which has evolved over many decades. It will then be possible to assess more accurately the impact of ad hoc rate-making decisions which cumulatively could have a significant impact on the environment. We hope the ICC will move forward as rapidly as possible with the examination of the rate structure now underway and that it reflect overall national priorities by giving particular attention to the impact of across-the-board increases that are applied to the existing structure which provides little or no incentive for transporting secondary materials.

Appendix A or Ex. Parte No. 281 is an excellent and

timely bibliography of the whole range of recycling literature. The candid reader cannot help but contrast this list with the dated references cited throughout the text of the draft statement. For example, no supporting citations on page 16 are more recent than 1961; on page 19, 1964; or page 31, 1951, and many date back 3-4 decades. The textbook references, from Lecklin (1966), Van Metre (1953), and Way (1956) are equally dated in terms of the national environmental, energy, and raw material concerns of the past five years. Also, many of the "principles" enunciated in the textbooks and quoted in the statement have a root source in past ICC decisions regarding rate-making philosophy. Accordingly, it appears there is a circular reasoning involved to the degree that past decisions are used to support current decisions via textbook quotations. There is need for solid independent analysis that considers new economic realities.

We believe the statement should contain a more rigorous economic analysis of the rationale supporting the existing rate structure and the proposal under consideration. With this information available, the Commission should be in a better position to assess the environmental impact of the proposed rate increase and to examine action alternatives as required by NEPA.

We hope these comments will be of assistance to you in the preparation of the final statement.

Sincerely,

/s/ Sidney R. Galler
SIDNEY R. GALLER
Deputy Assistant Secretary
for Environmental Affairs

Before the
INTERSTATE COMMERCE COMMISSION

EX PARTE No. 281

INCREASED FREIGHT RATES AND CHARGES, 1972
(Environmental Matters)

RESPONDENT'S COMMENTS IN
SUPPORT OF THE COMMISSION'S DRAFT
ENVIRONMENTAL IMPACT STATEMENT

April 12, 1973

The railroad respondents present the attached verified statements by way of comments in support of the determinations made in the draft environmental impact statement which was served March 13, 1973, as a report of the Commission.

The following identifies the verified statements attached hereto by affiant and commodity:

G. J. Robinson	iron and steel scrap;
A. C. Sullivan	paper scrap and iron & steel scrap;
Paul H. Banner	iron & steel scrap, paper scrap and textile waste;
G. K. Chilcott	fly ash;
V. H. Roewe	plastic scrap.

Respectfully submitted,

Edward A. Kaier
Thormund A. Miller
Albert B. Russ, Jr.
James L. Tapley
Harry L. DeLung, Jr.

by Harry L. DeLung, Jr.

Before the
INTERSTATE COMMERCE COMMISSION

EX PARTE No. 281

INCREASED FREIGHT RATES AND CHARGES, 1972
(ENVIRONMENTAL MATTERS)

IRON AND STEEL SCRAP

VERIFIED STATEMENT OF G. J. ROBINSON

My name is G. J. Robinson. I am Vice Chairman, Traffic Executive Association-Eastern Railroads, located at Two Pennsylvania Plaza, New York, N. Y. 10001. I have been engaged in traffic and transportation work for more than 23 years with the Traffic Executive Association-Eastern Railroads.

This statement is submitted in response to the Commission's request for comment on the Draft Environmental Impact Statement served on March 13, 1973.

In my opinion, those portions of the draft dealing with rates on iron and steel scrap and the alleged disadvantage under which scrap was said to be laboring vis-a-vis iron ore accurately reflect the present situation. Throughout this entire controversy, the railroads have uniformly contended that there was no significant relationship between scrap iron and iron ore which could be affected one way or another by freight rates, and particularly by the limited increases proposed by the railroads in proceedings of this type. Instead, as I stated in my earlier submissions (R.V.S. No. 17, V.S. No. 202), fluctuations in the price of scrap iron and the volume consumed follow fluctuations in the production of steel, both here and abroad.

The Impact Statement points out that consumption of scrap and pig iron decreased from 1969 to 1970 because of a general economic decline (p. 79). On the other hand, the Commission notes at the same point that the price of scrap iron rose from $27.64 to $47.50 per ton between 1967 and

1970. Herein, I have simply restated some of the earlier such material which led to the conclusions reached in the Impact Statement and added some more recent data to bring the subject up to date. It will be seen that the price and consumption of scrap continue to reflect demand in the steel industry.

Year	Raw Steel Production (Short Tons) (000)	Iron and Steel Scrap Consumption (Short Tons) (000)	Average Price No. 1 Heavy Melting Steel Scrap (Gross Ton)
1970	131,514	86,559	$42.18
1971	120,443	82,567	36.71
1972	133,103	90,476	41.59

Source: *Survey of Current Business*, February 1973; *American Metals Market*, March 7, 1973 (Pittsburgh prices).

As we have often pointed out in the past, scrap prices can, under given market conditions, vary substantially from month to month. This situation continues, as shown by the following monthly average Pittsburgh prices for No. 1 heavy melting steel scrap, drawn from the sources identified above:

		Per Ton
1972	July	$36.70
	August	40.15
	September	39.83
	October	38.85
	November	40.88
	December	42.29
1973	January	48.54
	February	49.26

The 2½ percent surcharge which was in effect until mid-July would mean an increase in the average scrap iron rate of perhaps 14 cents per ton. Yet, the August price was up more than $3.00 per ton over July, and, with no change whatever in freight rates, the February 1973 price is almost 123 percent of the August level. The only possible conclusion is that the increases here proposed will have no

significant bearing on either the price of or use of scrap iron and thus no effect upon the recycling process.

The recent sharp increase in prices, of course, is due in part to heavy foreign demand at a time when domestic consumption is also strong. On March 19, 1973, the Congressional Record carried certain remarks by Senator Saxbe of Ohio on the situation. Pertinent excerpts follow:

> "Rising world steel production has escalated foreign demand for iron and steel scrap. American scrap exports are thus running about 65 percent higher than normally experienced over the past 10 years. Since the United Kingdom placed an embargo on the export of ferrous scrap last fall, the United States has been the only industrial country to permit unlimited exports on this strategic steelmaking material."
>
> "Countries which formerly purchased their scrap in the United Kingdom have been purchasing their scrap here in the United States, thus, further aggravating an already difficult raw materials situation."
>
> "As a result of this high demand, a sharp increase in scrap prices has resulted. . ."
>
> "The net effect of this situation is to seriously increase the cost of domestic steel production. Increased costs threaten the job security of our domestic steel industry labor force. Also placed in jeopardy is the industry's continued effort to maintain reasonable price stability and their efforts to compete with foreign steel producers."

Obviously, minor increases in freight rates could have little, if any, effect on the scrap iron industry or upon the incentive to expand recycling under such conditions. The record brought up to date only emphasizes the accuracy of the railroads' position in this controversy over the past several years and the validity of the conclusion reached by the Commission in its Draft Impact Statement, i.e., that the demand for and the price of scrap iron fluctuate according to the economic laws of supply and demand, that freight rate levels *per se* are a very minor consideration, and that the increases here proposed will have no adverse effect on the recycling process as it involves scrap iron.

On the other hand, the railroad industry is still being

deprived of any increase in revenues from the rates on iron and steel scrap. The 2.5 percent surcharge has been cancelled since July 15, 1972, as a result of a federal court decision, and there is no way in which the railroad industry can now recoup the revenues thus lost. Significantly, the preponderance of any increase in revenues from iron and steel scrap would have accrued to the Eastern railroads, including such as Penn Central. In 1971, the Norfolk & Western, Chesapeake & Ohio, Baltimore & Ohio, Erie Lackawanna, Reading and Penn Central derived gross revenue of $71.4 million from the transportation of iron and steel scrap. A 4 percent increase would have provided an additional $2.86 mililon on an annual basis, and the benefits would be over $3.0 million at the substantially higher level of business activity in 1972. Approximately 70 percent of such additional revenue, moreover, would have accrued to Penn Central, Erie Lackawanna and Reading, all in reorganization.

VERIFICATION

DISTRICT OF COLUMBIA,
CITY OF WASHINGTON. ss:

G. J. ROBINSON, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

/s/ G. J. Robinson

Subscribed and sworn to before me this 10th day of April 1972:

/s/ Ellen M. Herlihy
My Commission Expires Feb. 28, 1977

VERIFIED STATEMENT
OF
A.C. SULLIVAN

My name is A. C. Sullivan. I am a member of the Standing Rate Committee, Western Trunk Line Committee, Room 1218, 222 South Riverside Plaza, Chicago, Illinois 60606. I have had more than 20 years experience in the handling of railroad traffic matters and have participated and testified in numerous proceedings before the Interstate Commerce Commission, including Ex Parte general freight rate increase proceedings.

This statement is a comment on the Draft Environmental Impact Statement of the Interstate Commerce Commission served March 13, 1973 concerning Paper Scrap and Iron and Steel Scrap.

The Commission statement gives a very comprehensive review of the uses of paper scrap along with varieties, movements and values.

In the Commission statement on page 109, it is reported that waste paper consumption in 1970 was 10.27 million tons and that 4.18 million tons or 39.7 percent moved by rail. The balance of the movements are by truck to consumers, generally within short distances. The movement of any substantial intercity scrap paper is over 90 percent by rail service due to lower transportation costs and the reluctance of motor carriers to handle this commodity.

Western Railroads had gross revenues of $10,697,210 in 1969 as compared to gross revenues of $13,254,072 in 1972 from paper wastes and scrap movements (STCC 4024), as reported in the I.C.C. Freight Commodity Statistics for 1969 and the QCS Reports for 1972. This is an increase of $2,556,862, or 23.90 percent and supports the railroads' contention that rate increases do indeed increase needed revenues and do not divert traffic to any significant extent.

PULP AND PAPER magazine of February, 1973 contains an article "Recycling is not the only answer to waste". This article states that recycling is only one answer. There are a number of alternatives to recycling as a means of reducing solid waste, and some of them are ultimately more

practical—at this time—than recycling. These alternatives include incineration of waste fiber to produce steam and electric power (an aid to the energy crisis), the use of wastepaper as fill in the manufacture of a variety of building and construction materials, etc. Many of these alternatives, along with some interesting data on processes and equipment to implement them are presented by well-known industry consultant Foster Doane.

The Commission statement states that "the bulk of paperstock is used in the production of lower grades of paper and paperboard" (page 97). The 1972 total value of folding carton shipments of $1,325 million is the best since 1966, according to an article entitled "Carton Value Rise, Best Since '66" in OFFICIAL BOARD MARKETS, March 31, 1973, p. 1. Of course, Ex Parte 256 and all subsequent general rate increases have become effective since 1966, and this is an indication that scrap paper is being used in increasing quantities and that the freight rate increases by rail do not impede its movement. The same article in OFFICIAL BOARD MARKET further states that the current total waste paper consumption is 12 million tons, which is considerably higher than the 10.27 million tons in 1970 as shown in the Commission statement at page 109.

Another indicator of the increased value of scrap paper is the wholesale price index published in the Statistical Abstract of United States with information from U. S. Department of Commerce, Bureau of Census, for years 1970-71. Figure for 1972 was published in Monthly Labor Review, March, 1973 issue from information by U. S. Department of Labor, Bureau of Labor Statistics.

Wholesale Price Index
(1967=100)

1970	125.0
1971	111.9
1972	133.6

In view of the increases in the value of scrap paper, and the increased consumption and potential consumption, the railroads believe that rail freight rate increases not only have little or no effect on the movement of this commodity but the increased rail revenue is essential to maintain continued availability of rail service to move the scrap paper to recycling points.

The balance of this statement will express my views with regard to iron and steel scrap as discussed in the Draft Environmental Impact Statement.

The Commission Statement represents a good summary of the motivation to move iron and steel scrap by the economics of the supply and demand for steel. It has been the railroads' experience that rates are not the real or basic reason for movement of this scrap by rail carrier, rather the supply and demand for steel production.

As shown on page 117 of IRON AGE magazine, dated January 4, 1973, the average composite of IRON AGE scrap prices at Pittsburgh, Chicago and Philadelphia per gross ton on No. 1 Heavy Melting Scrap was $27.62 for 1967 and $36.89 (estimate) for 1972. This is a $9.27, or 33.56 percent, increase over 1967 average composite prices.

The MINERALS YEARBOOK for 1969 and preliminary advance report for 1972, prepared by the Bureau of Mines, U.S. Department of Interior, Mineral Industry Surveys, shows that at iron and steel scrap consumer plants they received 43,679,000 net tons in 1969 and 44,154,000 net tons (preliminary report) in 1972. This represents an increase of 475,000 net tons.

The Western railroads had gross revenues of $37,674,868 in 1969 as compared to gross revenues of $44,717,719 in 1972 on iron and steel scrap (STCC 40 211) as reported in I.C.C. FREIGHT COMMODITY STATISTICS for 1969 and QCS Reports for 1972. This is an increase of $7,042,851, or 18.69 percent, which substantiates rail contention that rate increases do not divert or retard movements of iron and steel scrap.

With both an increase in prices of iron and steel scrap and an increased movement, it is obvious that there has not been, nor will there be, a diversion of this traffic account the modest increase in rail freight charges on this commodity. As stated by both the Commission's statement and railroad review, the sought increase will not have an adverse effect on our environment.

VERIFICATION

STATE OF ILLINOIS
COUNTY OF COOK ss:

A. C. SULLIVAN, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

A. C. Sullivan
A. C. SULLIVAN

Subscribed and sworn to before me this 4th day of April, 1973.

Margaret H. Nelson
MARGARET H. NELSON
Notary Public
My Commission expires: December 30, 1973

VERIFIED STATEMENT
OF
PAUL H. BANNER

I am Paul H. Banner, Assistant Vice President, Market Research, Southern Railway System, Washington, D.C. I have been employed by the Southern Railway since 1962.

I have analyzed certain statistics for the purpose of determining whether recent freight rate increases have caused any decline in the transportation by rail of secondary materials which move in significant volume in Southern Territory. I have used tonnage figures which are maintained in the usual course of business by the Southern Railway and the Seaboard Coast Line Railroad.

The commodities which move in the heaviest volume for recycling are metal scrap, including iron and steel scrap and non-ferrous scrap (STCC 40 2). The following figures show the tonnage moved by Southern and SCL during the last three years:

1970	1971	1972
2,448,222	2,422,580	2,634,643

There has been a slight increase in the tonnage during this period when the rate increases authorized in Ex Parte 265 and Ex Parte 267 were applied. The former increase was 5 percent subject to certain maxima and the latter was 6 percent within and to the South and 11 percent from the South.

Paper waste and scrap (STCC 40 24) are other commodities transported in significant volume for recycling in the South. The following figures show the tonnage hauled by Southern and SCL in the last three years.

1970	1971	1972
1,062,844	1,125,950	1,232,730

The volume of these commodities has steadily increased at a time when rates were increased 5 percent in Ex Parte 265 and from 6 percent to 11 percent in Ex Parte 267.

Textile waste (STCC 40 22) is transported for recycling

primarily within the South. The following figures for Southern and SCL show that this tonnage has remained steady with a slight increase from 1970 to 1972:

1970	1971	1972
507,854	492,950	522,164

Rates were increased on textile waste during this period by 5 percent in Ex Parte 265 and by 2 cents per hundredweight with a 6 percent maximum in Ex Parte 267.

In my opinion these statistics are a strong indication that the transportation of secondary materials for recycling is not appreciably affected by increased freight rates.

VERIFICATION

DISTRICT OF COLUMBIA, ss:

PAUL H. BANNER, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

/s/ Paul H. Banner
PAUL H. BANNER

Subscribed and sworn to
before me this 10th day of
April, 1973.

/s/ Philip J. Caffrey
Notary Public
PHILIP J. CAFFREY
Notary Public
in and for the District of Columbia

My Commission expires:
June 14, 1973

Verified Statement
of
G. K. Chilcott

My name is G. K. Chilcott. I have been engaged in railroad freight traffic work since 1950 and since February of 1970 have served as a member of the Standing Rate Committee, Southwestern Freight Bureau, 1015 Locust Street, St. Louis, Missouri 63101. I participated in the X-267 general rate increase proceeding.

I am the same G. K. Chilcott who filed Railroads' Reply Verified Statement No. 81 concerning Fly Ash, to Verified Statement No. 270 filed in this proceeding by Chicago Fly Ash Company.

I have reviewed rate applications filed with this Bureau from January 1972 to the present, and find there have been no requests filed with us for reduced rates on Fly Ash during that time. This indicates that the commodity is moving freely under present rates since it is customary for shippers to propose a reduction in rates when the existing level inhibits the movement of a commodity.

I have also examined the major motor carrier bureau issued tariffs applying from, to and within the Southwest and found that those tariffs contain no commodity rates applicable to Fly Ash in this territory. In the absence thereof, the only rates available for truck movement of Fly Ash would appear to be general class rates which are far higher than the governing rail rates.

From the foregoing facts, together with my general knowledge of this traffic, it is my opinion that general rail freight rate increases have not caused diversion of Fly Ash from rail in the Southwest.

VERIFICATION

STATE OF MISSOURI
CITY OF ST. LOUIS ss:

G. K. CHILCOTT, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

/s/ G. K. Chilcott

Subscribed and sworn to before me
this 2nd day of April, 1973.

/s/ Walter N. Clisist
Notary Public
In and For the City of St. Louis, Mo.

My Commission expires: July 17, 1974

Verified Statement
of
V. H. Roewe

My name is V. H. Roewe and I am vice-chairman of the Southwestern Freight Bureau, St. Louis, Missouri.

To the best of my knowledge there have been no proposals issued in the past several years to provide reduced rates on plastic scrap, which would indicate that the tonnage is moving freely on present rate scales; if it were not, we would have normally received proposals to reduce the rates. A review of a number of representative common motor carrier tariffs discloses only a few scattered rates published on plastic scrap, which is another indication that this commodity is moving freely by rail.

The absence of special rates in either motor carrier tariffs or rail tariffs, and the absence of legislation to provide reduced rates indicates that general rate increases, either rail or truck, do not disturb existing movements via either mode of transportation.

VERIFICATION

STATE OF MISSOURI
CITY OF ST. LOUIS ss:

V. H. ROEWE, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

/s/ V. H. Roewe
V. H. ROEWE

Subscribed and sworn to before
me this 2nd day of April 1973:

/s/ Helen M. Havird
HELEN M. HAVIRD

Notary Public in and for the
City of St. Louis, State
of Missouri.

My Commission Expires October 18, 1976.

Before the
INTERSTATE COMMERCE COMMISSION
WASHINGTON, D.C.

EX PARTE NO. 281
INCREASED FREIGHT RATES AND CHARGES, 1972
(ENVIRONMENTAL MATTERS)

COMMENTS OF GENERAL SERVICES ADMINISTRATION
ON DRAFT ENVIRONMENTAL IMPACT STATEMENT

Due date: April 12, 1973

COMES Now the General Services Administration (GSA) of the United States, representing the interests of the civilian executive agencies of the U.S. Government in their capacity as shippers, and respectfully submits, pursuant to the provisions of the Commission's order in the above-captioned proceeding dated March 5, 1973, and served March 13, 1973, its comments on the Draft Environmental Impact Statement issued by the Commission in this proceeding. GSA representation is authorized by section 201(a) of the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. 481(a).

I

The Commission reopened this proceeding for limited reconsideration of the environmental impact of previously authorized railroad rate increases on commodities moving for purposes of recycling, in accordance with the provisions of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* In its report on further proceedings served March 13, 1973—the so-called "Draft Environmental Impact Statement" to which GSA's comments are addressed—it construed and applied NEPA, finding, in general, that the rate increases in issue will not have a significant adverse impact on the quality of our

human environment and that "any environmental costs which may be expended as a result of our action in this proceeding [i.e., as a result of the authorized rate increases] are outweighed by the economic benefits derived by the railroads, and the resultant quality of rail service such benefits ensure." Interested parties were given 30 days from the date of service of the report in which to file comments; comments were specifically invited from, among others, "Federal, State and local agencies having familiarity with the subject matter."

II

GSA wishes to commend the Commission on its exceptionally thorough exploration of the facts and circumstances surrounding and affecting the transportation of recyclable solid wastes. It must be emphasized that GSA speaks only for the civilian Government agencies *as shippers*, and has no wish nor authorization to preempt the environmental-protection role delegated to the Council on Environmental Quality, the Environmental Protection Agency, or other agencies of the Government as part of their primary missions. GSA speaks for these agencies solely to the extent that they ship and receive goods in interstate and foreign commerce in the context of this proceeding.

In this capacity, GSA, like the Commission, is concerned with the economic needs of the rail carrier industry as they affect the industry's ability to provide service in accordance wth the public convenience and necessity and the requirewents of shippers, including the civilian executive agencies. In its initial filings in this proceeding, GSA took exception to certain of the carriers' proposed increases on recyclable commodities, and suggested that these increases be disallowed in whole or in part. In view of the Commission's Draft Environmental Impact Statement and the contents thereof, GSA now wishes to modify its position as indicated herein.

III

As described and interpreted by the Commission in its Draft Environmental Impact Statement, the facts appear to indicate that the subject rate increases will not significantly or measurably affect the movement of recyclable

commodities in many instances. Without extensive corroborative analysis and without attempting to prejudge the views of others who may elect to dispute these conclusions, GSA does not now contest their accuracy. GSA does believe the Commission should, in accordance with the terms and the spirit of NEPA, keep the transportation of these commodities under continued surveillance to insure that this situation is not detrimentally altered in the future.

In other cases, however, the Commission recognizes in its Statement that some adverse environmental impact will result from the subject rate increases. For example, at page 144 the Commission states that "a freight rate increase on cullet, accompanied by an equivalent or slightly greater composition rate increase on its raw materials competitors, may occasion an indeterminable decline in purchased cullet consumption." Moreover, GSA notes that the Commission's consideration in this proceeding has been directed principally to the issue of whether the subject rate increases will result in a diminution of recycling of solid wastes; the complementary question whether rate holddowns or even reductions might result in *increased* recycling has been left largely unexplored.

As noted, GSA speaks in this proceeding primarily from the standpoint of a shipper. Nevertheless, GSA is not oblivious to environmental issues such as those considered by the Commission herein; nor does GSA seek to myopically withdraw itself from involvement in such issues by cloaking itself in the insular garb of its shipper-oriented status. Under NEPA, *inter alia*, GSA is instructed to take environmental matters into consideration in its practices and procedures, as are other civilian Government agencies. Accordingly GSA, like the Commission, must weigh positive and negative aspects of the subject rate increases in arriving at its position.

In this context, while accepting the factual premises and analyses set forth in the Commission's Draft Environmental Impact Statement, GSA is not in full concurrence with the conclusions expressed therein. Specifically, GSA is not convinced that all feasible protection, with due consideration to the exigencies of the transportation industry and its various components (i.e., carriers, shippers and the public at large), is being accorded on environmentally oriented issues, under the terms of the Draft Environ-

mental Impact Statement. GSA therefore recommends that certain of the Commission's conclusions be modified in accordance with the views expressed in this statement, and that appropriate action be taken to implement those modified conclusions.

IV

GSA agrees with the Commission's underlying premise that environmental or other social considerations should not be so construed as to require indirect subsidization by the shipper community of the movement of recyclable commodities, through enforced maintenance by the carriers of noncompensatory rate levels on this traffic. GSA would not, however, carry this premise so far as does the Commission, to require that recyclables bear their full share of the carriers' revenue requirements. Where it is determined that reduced rate levels might reasonably be expected to result in increased recycling of solid wastes, GSA believes the Commission should give serious consideration to establishment of rate ceilings on such traffic no lower than the compensatory level.

In addressing itself to this topic, the Commission expressed certain reservations about the wisdom of such a course of action. Initially, the Commission appears concerned with the lack of "any scientific material which specifically enumerates the costs and benefits of recycling versus exploitation of virgin materials." It concludes that "we are being asked to accept, as an article of faith, assertions which have not been rigorously documented" respecting the environmental issues herein, and suggests that the absence of "a rational allocation system," based on quantified scientific data, renders any environmental discussion in the context of this proceeding in the nature of speculation. (Statement, pp. 178-179.)

GSA recognizes that a lack of scientific precision is characteristic of the present environmental question—although it must be added that the Commission itself, in its factual review of this question, has contributed to the literature in the field significantly. Nevertheless, as the Commission itself points out (p. 178), "it [is] no scientific sin at this point in time to be unable altogether to designate and fully evaluate the potential environmental impacts of policy decisions." The question before the Commission at

this time is whether it should allow a lack of full and rigorous scientific data to dissuade it from taking any affirmative action whatever—even in those instances where its own analysis indicates that affirmative action could be expected to have beneficial results.

GSA suggests that it is inconsistent with the aims of NEPA for the Commission to fail to implement its own findings that, in certain cases, rate holddowns and/or reductions would increase the recycling of solid wastes, solely because present data is not adequate to formulate some sort of "master plan" for resolution of environmental issues in the transportation industry. The Commission has identified the so-called "Dwarfing of Soft Variables Syndrome"—"if you can't count it, it doesn't exist" (p. 10)—and GSA suggests that the Commission, too, may be permitting itself to be victimized by this fallacy.

The Commission notes that imposition of requested holddowns on recyclable commodities would "place a very concrete burden upon the railroads and/or other traffic in the form of revenues foregone and/or additional rate increases" (p. 179). It further expresses concern that "to meet the railroads' revenue needs by limiting the increases to the rates on nonrecyclable commodities would tend to raise such rates to the level where they would no longer be just, reasonable or lawful" (p. 180).

To some degree, such sweeping statements appear inconsistent with the Commission's own finding that "the increase [on recyclables] would generate only a few million dollars in additional freight revenues." Nor does GSA suggest that holddowns be imposed universally on all rates on recyclable commodities; surely it would not be consistent with NEPA that rates be held down or cut back where the facts indicate little likelihood that such action would have an environmentally beneficial effect. If the Commission's factual presentations respecting the various individual commodities are to be accepted, the few holddowns/reductions that would appear to be environmentally appropriate would not appear to cast any significant burden on the carriers and/or other traffic. In the normal course of events, the carriers themselves may be expected to hold down certain rates voluntarily as a result of managerial decision, the revenues from which would far exceed the revenues associated with the proposed rate increases on

these rate-conscious recyclables. GSA believes it would be stretching the facts considerably to conclude that the few holddowns/reductions here advocated would unduly burden either the carriers or other traffic.

The Commission asserts that "the suggestion that the rates and charges on recyclable commodities be maintained at depressed levels, with the attendant additional burden that this necessarily would cast on the railroad rates on other commodities, is wholly at odds with the achieving of a cost-related pricing structure" (p. 177). GSA concurs —but at the same time, GSA questions whether achievement of "a cost-related pricing structure" should be regarded as an end in and of itself. The question here is one of priorities, and GSA believes that NEPA clearly indicates that, as between enhancing the recycling of solid wastes and achieving an abstract rate structure balancing, the choice should be made in favor of the former.

Finally, the Commission appears to be at least partially subscribing to the premise asserted by certain parties to this proceeding that those elements of the economy "responsible" for creation of solid wastes should bear the economic burden of waste disposal. For example, in its discussion of the merits and drawbacks of subsidization of the movement of recyclables (pp. 181-182), the Commission asserts that such subsidies "would not inure to the benefit of rail carriers, but rather would in reality benefit the shipper that creates the 'waste' in the first instance." It goes on to state that "the creator of the pollution would be able to move its 'waste' less expensively, and every citizen then would be subsidizing these polluters and permitting them to continue creating 'waste'" (p. 182).

In GSA's opinion, this is to some extent a simplistic viewpoint which will not wholly withstand close scrutiny. For example, should one affix blame on the junk dealer for the "creation" of junk-car waste? Or on the consumers responsible for scrapping obsolete automobiles? Or on municipalities which must cope with the problems of abandoned autos? Or on the retail merchants of new and/or used cars? Or on the automobile manufacturers for production of those cars? Or on the steel industry which initially produced the metal from which the cars are fabricated? Depending on how deeply one elects to pursue the matter, the list of those "responsible" for the "creation"

of this waste can be extended almost indefinitely to encompass virtually the entire economic spectrum.

Realistically, in most instances it is impossible to identify any one class of individuals, companies, etc., which may be described as "polluters." Pollution and its abatement cannot be considered the private concern of any alleged waste "creators"; the subject here is one of National concern, as clearly indicated by NEPA. By appropriate reallocation of the transportation revenue burden in such cases where this action might plausibly prove efficacious, the Commission has the opportunity in this and similar future proceedings to spread the economic burden associated with recycling through virtually all sectors of the economy, for the meritorious purpose of encouraging recycling of solid wastes to the benefit of—not any alleged "polluters" as a class—but the entire economy as a whole.

Once again, GSA must stress that its proposal for imposition of rate ceilings on recyclable commodities is intended solely for that traffic where, in the Commission's view, such action would prove effective in encouraging the recycling of solid wastes. The studies made by the Commission in the preparation of its Draft Environmental Impact Statement here under consideration form what appears to be a solid nucleus of facts on which to base such findings. GSA does not suggest alteration in these findings —it merely advocates that the Commission take affirmative action to implement the results of its studies as and where indicated.

V

As a long-term solution to such impediments to the recycling of solid wastes as are presented by the transportation rate structure, however, the above proposal is less than fully satisfactory. It seeks to substitute regulatory fiat for the competitive pressures that might be engendered by a freer market situation. It is on this basis that GSA wishes to delve more deeply into a topic given but passing mention in the Draft Environmental Impact Statement: Partial deregulation of the transportation of recyclable commodities.

At page 186 of its Statement, the Commission makes its only mention of this subject:

> "Another alternative considered is the deregulation by this Commission of rates for recyclable materials.

S.C.R.A.P. [Students Challenging Regulatory Agency Procedures] mistakenly contends that this Commission has taken similar action in respect to another socially desirable and price-volatile class of commodities, vegetable produce. It was Congress, not we, which declared that the trial transportation of agricultural produce should not be subject to economic regulation under Part II of the Interstate Commerce Act. However, this applies only to movements by motor vehicle and not to movements by rail. This decision rests in the sound judgment of the Congress."

The statements made by the Commission are, of course, factually accurate. In GSA's opinion, however, the Commission does not pursue this subject far enough. For example, the Commission fails to mention the fact that motor rates on exempt agricultural commodities are, in general, somewhat lower than corresponding motor rates on regulated traffic—the result being exertion of an added element of competitive pressure on railroad rates, as well. (GSA also fails to understand the Commission's reference above to the "trial" transportation of exempt agricultural produce. To the best of GSA's knowledge, there is no semblance of experimental impermanence associated with the agricultural exemption contained in section 203(b) of the Interstate Commerce Act.)

Many motor carriers—for-hire as well as private—experience substantial traffic imbalances in their operations as a result of regulatory impedimenta. These carriers regularly seek out and transport unregulated traffic on "back-haul" in order to relieve economic pressures on their regulated service. It is in part the incremental nature of this back-haul traffic which permits them to maintain reduced rates on agricultural and other unregulated commodities. In GSA's opinion, the goals inherent in NEPA would render recyclable materials a suitable candidate for addition to the list of exempt commodities.

This is by no means to suggest that any sweeping, industry-wide program of deregulation be advanced in the context of this proceeding. The current regulation-vs.-deregulation controversy being debated in various fora, including the Congress, is moot to these issues. GSA here proposes only limited deregulation of the movement of a

particularized sector of the traffic, in order to achieve the defined objectives of NEPA.

As the Commission notes, it lacks authority to exempt any traffic from regulation. However, the Commission does not lack authority to recommend to the Congress that such an exemption be added to the statute. In view of the pendency of much broader deregulatory proposals in Congress, with a broad base of opinion behind them, it is not unlikely that such a recommendation by the Commission—which has been one of the leading forces opposing deregulatory proposals heretofore—would carry considerable weight.

The Commission observes (p. 181) that "we are required to consider even those alternatives that lie beyond our statutory jurisdiction." It is submitted that the purpose of such a requirement is not academic; rather, the requirement is imposed for the purpose of eliciting from the Commission its views as to desirable actions within the context of NEPA. Under these circumstances, the making of a recommendation for partial deregulation of the transportation of recyclable commodities is clearly within the purview of the Commission in this proceeding. GSA believes the suggested partial deregulation would prove beneficial to the movement of recyclables via all modes—as a result of the competitive pressures that such action would engender—and respectfully suggests that the Commission so recommend to the Congress.

VI

At page 186 of its Statement, the Commission addresses certain comments specifically to GSA:

> "Federal procurement regulations have increased the use of recycled paper. Such regulations do not apply to other recyclable commodities. We believe that an increased demand for products manufactured from recyclable commodities by Government will result in increased utilization of recyclable commodities. This Commission therefore suggests the General Services Administration (GSA), a party to this proceeding, explore the adoption of appropriate regulations which would tend to create the needed demand for such secondary materials."

GSA thanks the Commission for its suggestion. Such activities are already being undertaken, and will continue, at GSA. The Commission makes reference to procurement regulations governing recycled paper; other areas are now being explored with a view toward weighing the merits of procurement policy promulgations respecting other recycled and/or recyclable commodities where it is deemed such action would prove environmentally beneficial. GSA would also point to this document, as well as previous submissions to the Commission in this proceeding, as further instances of its recognition of environmental considerations in its managerial activities.

VII

GSA's objective in this proceeding is the same as that of the Commission—to accomplish the greatest possible environment-oriented results, within the context of NEPA, at at the least possible cost in other areas. But, while GSA agrees that the costs of such results should be minimized to the greatest extent feasible, GSA cannot adopt the viewpoint that any cost, however small, should be rejected if the resulting environmental benefit will not produce offsetting economic gains. Some middle ground must be found in the cost-vs.-benefit comparison—a middle ground which GSA believes the Commission has not yet reached.

GSA believes the conclusions expressed by the Commission in its Draft Environmental Impact Statement are, as hereinabove described, inconsistent with its findings respecting the movements of individual solid waste materials. The proposals advanced in this document, GSA believes, are more in keeping with those findings. Therefore, GSA respectfully requests that the Commission modify its conclusions as herein proposed, and that it take the following actions:

(1) Order railroad rate holddowns and/or reductions where it is deemed such actions would substantially benefit the recycling of solid wastes. Such holddowns/reductions should be no lower than the compensatory level of rates. To the extent the Commission deems it necessary, the economic cost of such holddowns should be redistributed on other traffic as the Commission and the carriers find appropriate.

(2) Recommend to the Congress that solid wastes mov-

ing for the purpose of recycling be exempted from Federal regulation through appropriate statutory amendment.

(3) Take under continuing review the questions in issue in this proceeding with respect to environmental matters, for the purpose of making such future changes in its conclusions and actions as the facts and circumstances may warrant.

Dated at Washington, D.C., this 12th Day of April, 1973.

Respectfully submitted,

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Before the
INTERSTATE COMMERCE COMMISSION

EX PARTE NO. 281

INCREASED FREIGHT RATES AND CHARGES, 1972

COMMENTS IN OPPOSITION TO INTERSTATE COMMERCE COMMISSION

DRAFT ENVIRONMENTAL IMPACT STATEMENT

INSTITUTE OF SCRAP IRON
& STEEL, INC.
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Date Due: April 12, 1973

Comes now the Institute of Scrap Iron & Steel, Inc. and, noting continued disappointment and frustration with the refusal of this Commission to recognize the contradictions and inconsistencies of its unexplainable attitude regarding the transport of iron and steel scrap, offers these comments in opposition to the Commission's Draft Environmental Impact Statement served March 13, 1973.

The Institute cannot find in the entire labored discussion of the Commission any consistency of insight, any viable outline of decision criteria, any consistent basis of analysis, to support the distinction between iron and steel scrap and all other secondary materials. In fact, the Commission's Report seems to have been written by a series of commentators, some of whom present insight into the issues involved for particular segments of the overall subject

while others fail to take advantage of this insight or, in many instances, actually contradict these findings. These contradictions are presented below.

The overall tone of the Report is most easily captured in the conclusion that: "We have examined the increases which we have approved, held to a maximum of no more than 3 percent, and we find that such increases will not significantly affect the quality of the environment." (p. 189, also p. 54)*. That conclusion does NOT accurately present the findings of the report SINCE ALL RECYCLABLE MATERIALS BUT *IRON AND STEEL SCRAP* ARE ACCORDED THE 3% HOLDDOWN: NO HOLDDOWN WHATSOEVER WAS FOUND IN ORDER FOR SCRAP IRON (341 ICC 288 at 413), the major recyclable commodity that accounted for almost 50% of the total sales of secondary materials and approximately 70% of the total tonnage being recycled (p. 72).

It is, thus, with much remorse and following meticulous analyses of the Statement as presented, that the Institute concludes the following:

1. The Commission has decided, *despite*, the facts, that iron ore and scrap iron CANNOT compete (as differentiated from DO NOT compete since, in fact they do).
2. The Commission is determined to separate the *major recyclable commodity*—iron and steel scrap —from all other commodities involved in recycling and to treat ferrous scrap separately and harshly.
3. The Commission is NOT prepared to accept any testimony that argues against its apparently preconceived conclusion supported only by past Commission decisions and unidentified metallurgical expertise, both of which are at odds with the "real world".
4. The Commission is without foundation to justify its untenable position.

However fruitless it may seem, the Institute will respond to the Draft Environmental Impact Statement; the Institute has prepared this document to demonstrate again the impropriety of the Commission's posture. We submit it

* Unless further identified, all page references are to the ICC's Draft Statement.

with respect for the Administrative process and with full support for the role of the Interstate Commerce Commission in presenting sound, reasoned and equitable decisions in the regulation of transportation.

This response encompasses three sections. First, a reply is presented to the Commission's discusison of the economics of transportation. Second, the fact of metallurgical competition is again demonstrated. Finally, the contradictions and errors in the Commission's statement are noted and discussed.

The Economics of Transportation

At no point did this Institute ever suggest that the rate discrimination between ore and scrap "rests, exclusively, upon a surface comparison of their rates." (p. 15). The hundreds of pages of testimony presented over the past five years indicates far more substance which this Commission has chosen to ignore. For example, prior to ever alleging discrimination, the Institute established, but the Commission refused to acknowledge, that ore and scrap are alternative inputs to the steelmaking process. There can be no basis for further discussion about discrimination if the regulatory body refuses to face reality and continues to challenge a metallurgical fact.

But, even more to the point, if there were proper challenges to the Institute's presentation of rate comparisons, adjusted by metallurgical truism, why were these arguments not generated by the railroads who, in normal adversary proceedings, would be the reasonable source for such challenge? Instead, the direct thrust of cost and rate economics arises NOT from the logical recipient of the attack, namely the railroads, rather the defense emanates from the halls of the regulator. Certainly some question arises about the absence of such defense from the party most affected by the challenge, from the party which would find its potential revenues minimized by any approved holddown. Moreover, it seems more proper in an adversary proceeding to make decisions based on the record *as it was developed* rather than the result of erroneous convolutions of thought designed to support a conclusion that is based upon and supported by a decision in another case now more than 10 years old with the basic data therein describing conditions existing in 1958.

The Commission's role as defender of present and proposed distortions in rail rates on scrap iron and iron ore is truly subject to serious question.

Additionally, if the Commission is so certain of the cost situation facing the carriers, if it has developed cost finding in the areas of metallic competition for steelmaking so finely, why have not the railroads put forth these cost data which would subject such witnesses to cross-examination? It is a flagrant abuse of discretion when the Commission introduces evidence prepared by unknown experts and not found in the record but rather only in the proposed final decision. (See Rule 86, ICC General Rules of Practice, precluding the receipt of evidence after the close of the hearing).

But, for the sake of discussion, it is useful to review the 15 alleged criteria of ratemaking, (p. 19), even though it is noted that after pages of labored analysis, the Commission admits: "It is well known, however, that relatively little freight transported by the Nation's railroads moves solely in accordance with these principles . . ." (p. 31).

However, since the Commission felt it important to discuss these criteria, mention should be made of the salient points *not* discussed.

This is especially true since the Commission also says that, at least from a cost point of view, the only thing that counts is the car itself "Since the carrier's costs for moving the two cars are similar, except for such items as added fuel costs for pulling a heavier car . . ." (p. 21).

Nowhere does the ICC differentiate between iron ore and scrap iron in the matter of (1) density (2) liability to damage (3) hazard to other commodities (4) perishability or (5) liability to spontaneous combustion, since *it is not possible to separate ore from scrap on these bases.*

In the case of (6), loss and damage, the Institute is not aware of any serious loss or damage problem for shippers of iron ore, yet it knows of shippers experiencing problems of freight claims collection for losses in transit of scrap iron. The railroads generally refuse to meet their common carrier obligations in the matter of freight claims for scrap iron losses and, as shown before this Commission (Loss & Damage Claims, 340 ICC 515; Practices and Policies in the Settlement of Loss and Damage Claims on Grain and Grain Products, Docket 35220; Louis Padnos Petition for Investi-

gation, Docket 35767), the carriers, by refusing to pay scrap claims, have neutralized the possibility that claims on scrap are more significant than those on ore.

For (7), the Institute has presented metallurgical analyses (V.S. 335-A) which demonstrate that, on the average, the rate on scrap iron should be one and one half times HIGHER (but not two and one half times higher) than the average rate for iron ore simply because the scrap on the average is metallurgically a more valuable commodity.

Items 8 through 12, which are grouped in the Commission's anaylsis, likewise cannot be differentiated in the case of competing metallics. The two sources of iron—scrap and ore—are easily stowable, easily loaded, not of excessive weight or length and require minimal attention during loading or transport. (The cost and investment of *ore* loading docks is *nowhere* mentioned).

Conditions of the scrap industry are certainly no better than in the iron ore industry (item 13) though the public concern with the respective industries is properly a subject of interest. As was noted at the time of the Hoch-Smith Resolution, commodities, especially those in which the public has an unusual interest, should be made to "freely move" (p. 26). The desire of the public to remove obsolete metallics accumulating in the form of solid waste is of very high concern. Accordingly, the conditions are such that scrap iron processing merits considerations of preference, not prejudice.

In the discussion of (14), value of service, the Commission concludes: ". . . it simply means that the elasticity of demand for railroad service has increased greatly and that shippers of freight will divert their traffic to alternative modes when confronted by increased railroad charges more so than they ever have been able to do before." (p. 27). This obviously indicates that the Commission failed to understand the CAPTIVITY of scrap iron shippers who have no choice generally but to use rail transport.

Unrebutted testimony by Witness Barnes (V.S. 335-A, pp. 15-16) shows and explains the unique dependence of the scrap shipper on the railroad carrier to serve his customers. It is the classic situation of captivity, where the choice to the shipper is pay the price or not to ship. Diversion in such a circumstance is a vain hope—***there can be no diversion if the customer will not accept the material except by rail.***

Item (15), product competition, is what the Institute has devoted five years of both internal and external research time to prove, namely, that scrap iron and iron ore are *direct substitutes in the steelmaking process.* This very point is understood almost universally. In fact, it seems THAT EVERYONE BUT THIS COMMISSION UNDERSTANDS THAT THE ONLY TWO SOURCES OF IRON UNITS (scrap and ore) MUST, AND DO, COMPETE.

Following the discussion of class rates, the transport economics presentation shifts to the area of commodity rates and here the Commission submits additional criteria. In this section, volume, regularity, duration, direction and length are added (p. 32).

The Commission raises all sorts of fallacious arguments but nowhere is there any substantive proof of differences between ore and scrap. For example, in the discussion of volume, a movement from Baltimore, Md. to Harrisburg, Pa. is presented (p. 41). At no point is there any explanation about the reason for this choice. Nowhere does the Commission even imply that the volumes involved are comparable or is the reader given an insight into any of the influencing judgmental factors which led to this one rate being offered as THE key upon which generalized analysis would be based.

What is gained by noting that "... it requires little or no elaboration to justify lower rates when the movements reasonably can be expected to continue for several years than when their duration is anticipated to be short-lived" (p. 34). Does the Commission mean by this that scrap iron from New York City is longer or shorter lived than ore from the Mesabi Range? Does the Commission intimate that ore or scrap has the short duration? What is the language all about?

In the matter of direction, does the Commission account for the 100% empty return of train loads of "highly specialized" (p. 39), high cost iron ore cars, whereas virtually every car moving into a steel mill with scrap iron moves out with a load of new steel. Nowhere are such factors noted yet the clear implication is that somehow ore does "better" on these criteria, thus it should have a lower rate.

What is most astounding, however, is the conclusion that: "It is against a background of these many, varied, and yet significant factors that enter into the establishment of the relationships that obtain in the railroad structure

that the axiom that a mere disparity in rates does not establish discrimination or undue preference, assumes real meaning." (p. 35). It bears repeating that:

(1) NONE of these factors were directly related to the ore/scrap comparison,
(2) NO ONE ever suggested that "mere disparity" in ore and scrap rates is axiomatically discriminatory,
(3) NO basis exists for the Commission to ". . . conclude that no case for discrimination or undue preference has been made . . ." (p. 35).

To cite a range of possibilities and then to assume that each is significant for one but not the other commodity, WITHOUT ONE IOTA OF PROOF, is NOT JUSTICE.

Moreover, whereas the Commission might feel that comparing revenue per 100 pounds ". . . does not establish that the former [scrap] was disadvantaged in relation to the latter [ore]," (p. 35) and whereas many comparisons could indeed ". . . reveal(s) very little" (p. 35), and whereas "It tells us nothing about the transportation characteristics we have just discussed" (p. 35), SUCH A PRESENTATION CLEARLY SURPASSES ANYTHING PRESENTED BY THIS COMMISSION IN ATTEMPTED REBUTTAL. Moreover, the Commission proposed this procedure itself in *its* arguments based on average revenue per 100 pounds or per ton (pp. 41, 54, 94-95).

The Commission NOWHERE answers the questions about comparisons between ore and scrap *of* duration, regularity, volume, etc. Rather, after decrying the presentations of the scrap iron industry, it simply falls back upon platitudes not supported on the record to bolster its conclusions.

The Commission notes its "experience" with these commodities (p. 36) but NOWHERE does it cite these data. On page 36, the Commission finds it quite proper to infer that scrap is an unfavorable commodity ("dumped into gondolas") while ore is shown in a favorable light ("flows into hoppers"). What is the ". . . competition that is characteristic of the iron ore area" the absence of which is hinted in the case of scrap? (p. 36). Why is the Commission overly protective of ore traffic while it feels free to

attack, without apparent knowledge or proof, the movement of scrap iron?

Why does the Commission ignore the massive investment and operating costs of railroad ore docks? Does the Commission not know of the railroad feeder systems in existence in most areas for commodities *other* than scrap iron or does scrap iron alone create the need for these branch and feeder lines? (p. 38). Is there not a single redeeming factor involved in the rail movement of ferrous scrap in the mind of this Commission?

Could not the Commission be slightly confused in citing seasonal movement of "certain types of scrap . . ." (p. 38) while ignoring the closing of the Great Lakes in the winter and its effect on the movement of ore? Why does the Commission find that the costs between two cars (cottonseed and loose cotton) "are similar, except for such items as added fuel costs for pulling a heavier car" (p. 21) yet this conclusion is not found when one of the cars happens to be scrap iron and the other iron ore?

And, if the average revenue per ton is a reflection of the Institute "naivete" (p. 15) what more value arises from multiplying that figure by the volume in the car (p. 41).

Perhaps most startling, however, is the choice of the single Baltimore to Harrisburg move (p. 41) and inferring that it is somehow typical of Official Territory or U.S. movements WITHOUT ANY PROOF WHATSOEVER AND, IN FACT, CONTRARY TO THE ACTUAL RESULTS.

The Commission says the Official Territory rates are "slightly lower" on ore than on scrap iron (p. 41) and shows the $3.87 scrap rate and the $3.57 ore rate from Baltimore to Harrisburg. Were it only that rates were so related. THE AVERAGE RATE RELATIONSHIP IN 1969 IN OFFICIAL TERRITORY WAS $4.70 G.T. FOR SCRAP IRON AND $2.58 G.T. FOR IRON ORE (Statement TD-1 Carload Waybill Statistics, 1969, pp. 240 and 019 calculated as 2240 lbs $\times$ cents per 100 lbs). Moreover, during that year the average rate relationship U.S. to U.S. was $5.11 G.T. for scrap iron and $2.67 G.T. for iron ore (TD-1, pp. 239 and 019).

THIS IS A FAR CRY FROM THE ARTIFICIAL SINGLE EXAMPLE OF ONE ORIGIN AND ONE DESTINATION.

PRECISELY WHAT IS THE GOAL OF THE COMMISSION IN THIS PRESENTATION.

Moreover, this same Commission says: "The major problem in calculating the effect of Ex Parte No. 281 proposed rate increases is the lack of current rate data" (p. 93). Are there or are there not data by which to analyze the problem?

Then to compound the error, the Commission proceeds to use the physical characteristics of the ONE Baltimore to Harrisburg move to indicate broad territorial implications. The variable cost of that movement (p. 42) is as demonstrative of the Official Territory relationships as the temperature in Buffalo on May 1st is demonstrative of the average temperature of all cities above the Mason-Dixon line on that day. There is *NO* showing, not the *slightest* indication, of representativeness. The Commission is laboring to prove a point and it apparently found the one rate comparison which indicates the desired conclusion. This is not analysis; it is not the argument of the regulator; it is the argument of the respondent.

In truth ". . . the foregoing comparisons of the movements of iron ore and iron and steel scrap . . ." (p. 42) permit NO conclusion but that the exercise should not have been undertaken.

The Metallurgy of Steelmaking

It is indeed a strange situation when the science of steelmaking, agreed to by metallurgists for *both* the proponents and opponents of the general rate increase (see V.S. 335-A and Cross Examination Witness Pepper, T.654-699), becomes a matter of contention between these eminently qualified scientists *and* the Interstate Commerce Commission. To envision an administrative agency of the Federal government challenging the findings of world recognized authorities is staggering to the imagination especially when AT NO POINT IN THE COMMISSION'S PRESENTATION IS THERE EVEN THE SLIGHTEST INKLING OF THE SOURCE OF THE METALLURGICAL EXPERTISE IT SO FORCEFULLY PRESENTS. Again, it appears that the Commission has become one of the protagonists in this situation, not the judge hearing from adversary parties.

However, it is essential to demonstrate the fallacy of the argument as undertaken by the Commission.

1. The absence of limestone from the equation in the Battelle Report (V.S. 335-A, p. 13) is well documented. Does the statement "There is little doubt that this (limestone) should be included in the equation" (p. 92) mean that the Commission has greater insight into the role of limestone and fluxes than does Battelle? Where is the proof of this insight? Does this mean that the Commission knows more the way in which limestone moves to the mills and that trucking is not the significant factor in limestone movements as set forth by Witness Barnes? Where is this insight? Where did the Commission acquire this metallurgical expertise?
2. The relationships as presented by the Institute DO TAKE INTO ACCOUNT THE QUANTITIES OF FUELS AND OXYGEN WHICH ARE REQUIRED TO CONVERT THESE MATERIALS INTO PIG IRON. (p. 90).

   The Commission ignored the presentation by Witness Barnes (V.S. 335-A, p. 13) wherein it is obvious that ALL OF THESE FACTS HAVE BEEN CONSIDERED.

   Moreover, it is fuel which is the fallacy of the presentation provided by the railroad TRAFFIC EXPERT, NOT THE RAILROADS' METALLURGIST, and it is fuel which destroys totally the presentation adopted by this Commission.
3. The Commission fails entirely to understand the function of coal in the steelmaking process (p. 91-92). As clearly presented in V.S. 335-A, p. 12, "The appropriate reducing agent is metallurgical coal (as coke), which may be distinguished in function from the coal used to melt the reduced iron to form hot metal". The Commission refuses to understand that *only a small portion of the coal charge is for iron ore REDUCTION; the major segment of the coal charge is for HEAT.*

It seems absurd to have to point out that just as coal is needed to heat cold iron ore so also is energy needed to

heat cold scrap iron. It is utterly incredible that the Commission continues to refuse to acknowledge this basic point. The Institute understands the carriers' ignoring need for energy to heat cold scrap iron which OFFSETS, as a transport matter, the energy needed to heat the iron ore, BUT THERE IS NO REASON WHATSOEVER FOR THE COMMISSION TO CONTINUE THIS CHARADE.

If the Commission would merely read the cross-examination of Witness Cohen in Ex Parte 265/267 (Increased Freight Rates 1970/1971), the absurdity of the analysis would be evident (see Transcript pages 1750-53 which conclude with the admission that "None of these transportation elements (of the energy needed to heat scrap iron) of cost have been put in . . . (the) . . . left hand chart of page 7 . . ").

Either the cost of energy is added to the calculation of transport costs for scrap based steelmaking or the costs of energy (coal) in the making of steel based on iron ore must be deleted. There is no possible way this point can be challenged other than by pure blindness to the rules of logic and equity.

The "naivete" of the Commission is also demonstrated in its total failure to recognize the method by which scrap reaches the furnace while fully comprehending the ore movement process. It should come as no surprise to the Commission that junk autos, old refrigerators and the other environmental problems which are the heart of this undertaking, do *NOT* move directly from where they are found to the mill. As the Commission points out *only* in the case of ore, there are really two movements (p. 93)—but there are also two movements in the case of obsolete scrap iron, one to the processing plant and the second to the mill (This was properly noted by the Commission in earlier decisions, including, for example, General Rate Level Investigation, 1933, 195 ICC 5). Thus, the Commission again finds it proper to present only one side of the issue—to the extent that both commodities have duplicate moves for many of the tons of materials at issue, they *both* should be acknowledged.

These conditions make it unnecessary to discuss the errors rampant in the concluding presentation of the iron and steel scrap discussion (pages 94-96). However, it should be sufficient to conclude that the calculation of $5.58

per ton for scrap on the average and $8.49 per ton for ore is simply fallacious.

1. Coal is not properly recognized on both sides of the equation.
2. Fluxes are not properly recognized on both sides of the equation.
3. The calculation is totally meaningless.

Errors and Contradictions

The contradictions and errors in the Report occur so frequently as to make critical comment difficult. Some of the more significant examples are presented below.

1. In discussing glass recycling, the Commission says: "Conceivably, transportation rates and costs may make the difference between cullet being recycled or being left in sanitary landfill" (p. 140). This is a perfectly proper hypothesis and, to meet it, the Commission ORDERED A HOLDDOWN IN THE INTERESTS OF THE ENVIRONMENT (p. 144).

In contrast, the Commission says in the area of steelmaking, "However, scrap and ore do not enter the steelmaking process at the same point, and are not interchangeable from a technological standpoint" (p. 85).

The Institute presented unrebutted metallurgical testimony in support of the known condition of alternation between metallic sources. Not only did the Battelle Memorial Institute witness establish the factual basis for substitution of ore and scrap (V.S. 335-A), but the cross-examination of railroad metallurgical witness Pepper confirmed these points (T. 677-678, 670-671).

For the many areas of agreement by the two metallurgists, ignored *entirely* by this Commission, the ISIS Environmental Statement, summarizing these points, already presented on October 25, 1972, is repeated:

"1. *only* ore and scrap contain the iron units needed in steelmaking (Pepper cross-examination, T. 695; Barnes Verified Statement No. 335-A, p. 1)
2. ore and scrap may be mixed by choice of the melting personnel in the interests of economic steelmaking (Pepper, T. 695; Barnes, p. 12)
3. ore can and does replace scrap as a coolant in the Basic Oxygen Furnace (Pepper, T. 695; Barnes, p.7)

4. the percentage of scrap consumption in the B.O.F. can be varied (Pepper, T. 695; Barnes, p. 8)
5. iron ore and scrap iron are interchangeable in that they are "trade off" items and compete with one another (Pepper, T. 671; Barnes, p. 12)
6. the price of scrap has a significant impact on the decision to use scrap iron (Pepper, T. 679; Barnes, p. 21)
7. the price of scrap iron influences the volume of hot metal used at any given time (Pepper, T. 670; Barnes, p. 9)
8. freight rates impact the movement of scrap iron (Pepper, T. 692; Barnes, p. 22)."

Metallurgical witnesses of both the Institute and the railroads agree that ore and scrap compete and, that being so, there must be recognized the possibility that discriminatory transport costs hinder the recycling of ferrous scrap. This the Commission found properly in the case of cullet, but specifically denies in the case of iron and steel scrap despite expert unanimity to the contrary.

2. The Commission found that: "There appears to be no technological limit to cullet usage in certain glassmaking processes. Thus, even if nearly 100 percent of the input were cullet, the end product could be equal in quality to currently produced glass containers" (p. 134).

In contrast, this Commission finds that ". . . at most only 30 percent of the charge [to a B.O.F. furnace] can be scrap" (p. 83). This is in direct contradiction to the evidence presented by Battelle Memorial Institute (V.S. 335-A, p. 12), and more importantly in this adversary proceeding, it contradicts the evidence developed from the railroads' metallurgist during cross-examination (Witness Pepper, T. 677-678), wherein it is noted that steel can be produced by the electric furnace or the B.O.F. "from one hundred percent ore based iron, one hundred percent scrap based iron or any combination . . ."

Thus, in glass manufacturing the Commission admits wide ranging technological substitution of scrap for primary raw materials; while on a far more detailed record, proving iron unit substitution of scrap for ore, it denies the interchangeability concept in steelmaking.

3. The Commission notes that ". . . at most only 30 per-

cent of the charge can be scrap" (p. 83) and in the very next paragraph states "It is possible to increase the proportion of scrap in the charge by preheating the scrap before it enters the furnace, as some companies are now doing" (p. 83).

Obviously "at most 30 percent" is being violated and whereas the railroads' metallurgist noted the inconsistency (Cross-examination, T. 677-678), the Commission continues to insist that what *is* happening *cannot* occur.

4. Again under textiles, the Commission notes that "In the absence of specific cost information, it is not possible to determine whether a particular class of waste materials is carrying a discriminatory rate" (p. 127). Yet, this Commission found no difficulty in establishing costs for movements of ferrous scrap, not only general regional costs, but the *specific costs* of particular movements such as Baltimore, Md. to Harrisburg, Penn. (p. 41). For some reason, precise costs are available for scrap iron, but for no other commodity for which recycling is the only use.

Again, in discussing transportation of scrap glass the Commission states at p. 141:

> "Cullet may be more difficult to handle than its raw materials counterparts; as a result it may be somewhat more expensive to load and unload. It is difficult, however, to determine precisely what portion of the disparity in freight costs may be attributed to these characteristics. Further study of the rail rate structure in this area will be necessary before charges of discrimination can be dealt with in a totally definitive manner."

But in dismissing the Institute's claim that present railroad freight rates discriminate against scrap iron and thus favor iron ore, the Commission says that *costs* attributable to differing transportation characteristics justify the present rate levels on these two commodities (p. 42).

Finally, on page 42, the Commission offers the following cost statistics for iron ore and steel scrap movements in Official Territory to support their conclusion that existing rates do not discriminate against scrap iron and steel and prefer iron ore.

Official to Official—1969

	Ratio (%) of Revenue to Variable Costs (Contribution)	Ratio (%) of Revenue to Fully Allocated Costs (Contribution)
Iron Ore	143.1	103.8
Iron and Steel Scrap	137.8	120.1

These statistics show that the ratio of revenue to variable costs is "slightly" higher for ore than for scrap but the ratio of revenue to fully allocated costs for iron ore is *considerably* (not "slightly" as noted on p. 42) *less* than the ratio of revenue to fully allocated costs for scrap iron.

More revealing, however, are the *average U.S. to U.S.* statistics, which are:

U.S. to U.S.—1969 *

	Ratio (%) of Revenue to Variable Costs (Contribution)	Ratio (%) of Revenue to Fully Assocated Costs (Contribution)
Iron Ore	130.0	95.3
Iron and Steel Scrap	142.1	122.2

* Source—Department of Transportation Burden Study, 1969 Part III at pp. 5 and 40.

It should be obvious from these data that scrap iron and steel is considerably *more* profitable to the carriers in *both* ratio of revenues to variable and to fully allocated costs.

Presuming for the sake of argument that these data are correct, it is relatively easy to calculate the total dollar value of respective contributions over variable costs, namely, approximately $56 million for ore and approximately $40 million for scrap iron.

This is not a very large difference, considering the apparent overriding revenue concern of this Commission. Moreover, the difference reflects a number of adjustments in the matter of iron ore costs which, in themselves, raise questions since their effect is to LOWER the cost of such

Total Dollar Contributions
to Variable Costs—U.S. to U.S.
(Rounded to Millions)

	Iron Ore	Scrap Iron
Total Revenue*	$242,000,000	$136,000,000
Variable Cost (Total Revenue Divided by % of Revenue of Variable Costs)	186,000,000	96,000,000
Contribution	$ 56,000,000	$ 40,000,000

* Source—ICC Freight Commodity Statistics, 1970.

service. Mention must also be made of the ABSENCE of any cost considerations involved in ore docks and ore unloading facilities. Thus, the OVERALL NET CONTRIBUTION OF IRON ORE IS CERTAINLY NOT VERY MUCH DIFFERENT THAN THAT CONTRIBUTED BY SCRAP IRON.

Of equal importance, moreover, is that on a FULL COST BASIS, SCRAP IRON YIELDS A TOTAL NET PROFIT OF $25,000,000 WHILE IRON ORE RESULTS IN A NET *LOSS* OF $11,000,000.

Net Profit or Loss
(Rounded to Millions)

	Iron Ore	Scrap Iron
Total Revenue	$242,000,000	$136,000,000
Full Cost (Total Revenue Divided by % of Revenue to Fully Allocated Costs)	253,000,000	111,000,000
Net Profit (Loss)	($11,000,000)	$ 25,000,000

Certainly, using the ICC's own data, scrap iron is a *very compensatory product* and clearly deserves to share at least some of the consideration which seems to emanate from the Commission whenever iron ore traffic is discussed.

There is, thus, a very great area in which to adjust scrap iron rates *downward* and yet retain very compensatory

levels. More importantly, however, is the fact that since relative compensation between ore and scrap clearly shows the high contribution of scrap traffic, the requested holddown, regarded as a metallurgical necessity, can also be supported as a revenue matter.

5. The Commission recognized the natural resource implications of virgin timber versus paper scrap by noting that "... recycling of products of non-renewable resources, such as minerals, represents true conservation, as opposed to renewable resources, such as trees" (p. 111). The logical conclusion would be that iron ore, a major natural resource being utilized annually at the rate of tens of millions of tons, would be protected in the interests of conservation through recognition of the need to stress the use of the substitute secondary material. Thus, the normal expectation would be a holddown for paper scrap (which *DID* occur) but even more so for scrap iron (*which did NOT occur*).

6. The question of price fluctuations in a freely traded commodity is appreciated in the discussion of paper scrap including a recognition of the role of price gyrations around a long-run "equilibrium" point (p. 107) yet this same point, so often presented to this Commission in the past (e.g., V.S. 335, p. 13-14) is specifically miscast in the matter of ferrous scrap (341 ICC 288, at 397). The price of a freely traded item has *no* relevance to the freight rate at any one period of time but a permanent increase in rates, which becomes part of the long-run equilibrium cost, will increase the price permanently to the detriment of the commodity's recyclability. Inland Steel Company pointed this out to the Commission by stating that: "The price of scrap [iron and steel] and *the cost of its transportation* very substantially affect the price of the finished product (Protest and Petition of Inland Steel Company dated March 20, 1972, in Fourth Section Application No. 42360 (emphasis added). It is also understood by the Commission in its discussion of paper waste (p. 107) but, again, not for ferrous scrap.

The average price of heavy melting steel scrap in 1970 was $41.25 per gross ton, less than the 1957 average price of $47.10 (341 ICC 288, at 397-398). Moreover, the 1971 price of $34.46 (V.S. 335, p. 8) was *considerably* less than the price in 1957 and the 1972 price did not exceed the price of 15 years earlier.

7. The Commission understands that some recycling is not occurring at anything approaching its potential. "Technologically, the paper industry could accept a much higher quantity of paperstock than it does" (p. 101), yet this is specifically denied in case of ferrous scrap (see 30% maximum noted p. 83). The Commission is willing to accept as fact the reports that kraft paper producers could increase their consumption from the present 5% consumption level to "between 30 and 50% without violating paperboard quality specifications" (p. 101), yet it refuses to acknowledge the wide range of technological substitution inherent in the making of steel.

8. The competition between alternative sources to the steelmaking process is NOT scrap iron and pig iron. This Commission continues to insist, relying on *itself* as the expert source, that scrap iron and pig iron are the steelmaking substitutes. This, simply, is wrong. The justification process for this erroneous conclusion is not in the least convincing.

First, the citation of 316 CC 55 (p. 45-46) is a dated source; much has transpired in the making of steel in the past 10 years, even more so since the record is based on totally stale pre-1959 data. Thus, all significant current factors, such as the pre-eminence of the B.O.F., the advent of metallized pellets and the growth of the electric furnace are entirely ignored, as are the other factors noted in the Commission's discussion such as junk automobile shredders and continuous casting.

Second, the Commission has argued that specific costs do not exist yet the thrust of its presentation deals with intimation of cost differences.

Third, the Commission at page 45 cites Ex Parte 262 (337 ICC 436 at 474) as the basis for support without acknowledging properly the decisions in Ex Parte 256 (332 ICC 280 at 331) and 259 (332 ICC 714 at 743) wherein the need for holddown parity with IRON ORE WAS ESTABLISHED.

Fourth, the Commission overlooks its own decisions in the matter of holddown parity by refusing to recognize properly the relationship *it found between scrap and ore.* In discussing Ex Parte 259, this Commission said: "Upon a more detailed evidentiary presentation, we concluded that justice would be done if scrap iron and pig iron bear the same share of the additional revenues needed by the rail-

roads and limited the increase to the same amount" (p. 9, Appendix B). What is *not* said (though it appears in the quote following in that Appendix) is that INCREASES ON BOTH SCRAP IRON AND PIG IRON WERE HELD TO THE *SAME* LEVEL APPLIED TO *IRON ORE*.

Fifth, the reputation of Battelle Memorial Institute supports the statement that "Cast pig is *not* used for steelmaking" (V.S. 335-A, p. 7), yet this Commission argues that ". . . pig iron and scrap are similar in ferrous content and can be substituted for each other to a significant degree" (p. 90). SUCH A CONCLUSION IS NOT IN LINE WITH THE FACTS.

Sixth, this Commission refuses to acknowledge that just as pig iron is a product of iron ore so also is processed scrap iron a product of obsolete, non-usable, metallic solid waste. The competition is between the basic materials and obviously both sources need some processing or refining to make them usable as a charge to the steelmaking process.

Why this Commission continues to argue that pig iron and scrap iron compete in the face of opposite metallurgical testimony is an unexplainable condition that demands explanation. (V.S. 335-A, p. 14 and T. 665-668, 677-678). That conclusion is ERRONEOUS.

Moreover, the Commission itself shows this error is being made by noting correctly that ". . . most pig iron goes into the steel furnace in molten form. . . ." (p. 91). The molten form is NOT pig iron, it is hot metal. As is presented in V.S. 335-A (p. 7), "Hot metal, owing to its heat content and its relatively high content of dissolved carbon and silicon, is much better suited to steelmaking"—much better, that is, than PIG IRON. The effect, thus, is that "Hot metal is an internal, intermediate consisting of iron values *and* large energy values; pig iron, if produced at all, is another commodity altogether, with no use as a primary input to steelmaking" (V.S. 335-A, p. 9). Unless the Commission is alleging an expertise beyond that of Battelle, the error of pig/scrap competition must cease.

The issue of what are the competitive materials also needs to be laid to rest once and for all. Steel is about "98 percent iron" and "virtually all such iron enters as either iron ore or scrap iron. There is no third source of iron other than trivial impurities found in fluxes and fuels. Even the iron in finishing alloys originates as ore or

scrap" (V.S. 335-A, p. 9-10). THE CONCLUSION IS OBVIOUS: IT IS SCRAP AND ORE THAT COMPETE IN THE MAKING OF STEEL.

12. The concept of competition is not appreciated. The fact that freight can be placed on a truck and moved over a paved road from origin to destination is recognized as competition for railroad traffic even though by rail the material is placed in a freight car and moved over a steel rail from origin to destination. That competition is the *production of transportation; the end product—transport —is the competition, not the particular vehicle in the transport area used to create the product or service.* This is understood and appreciated by the Commission, but is specifically denied in the case of steelmaking.

Although iron ore might first enter the process via the blast furnace whereas most scrap enters via a steelmaking furnace, the *end result is new steel*—be it originating from ore or scrap or a combination of ore and scrap. *Just as truck and trains compete, so also do ore and scrap.*

The Commission erroneously requires direct "technological interchangeability" (p. 85) for steelmaking competition, yet nowhere is there found the requirement that trains must be able to move over paved highways or barges be able to float down railroad rights-of-way for the concept of transport competition to be recognized.

If the Commission would clear away this chaff of narrow vision and simply relate the situation to its own paticular areas of expertise, the error of the conclusion would be patently obvious.

9. The Commission refuses to acknowledge facts presented in the record without challenge. The movement of ferrous scrap by rail is generally that identified as "purchased" as contrasted with that generated and consumed within the mills without the need for transport (so-called home scrap). Despite repeated presentations proving the negative impact on the sellers of scrap (V.S. 335-A), the Commission continues to improperly group the specific data into aggregates to support its erroneous conclusion that rates have not impacted recycling.

The Commission says, ". . . the amount of scrap in the total furnace charge has remained constant for almost 30 years. . . ." (p. 80), but this is simply a half truth. The percent of recyclable materials in that total has DE-

CLINED; the reason for the stability in the market share is use of home scrap on a relatively higher basis (V.S. 335, p 5). Purchased scrap receipts by mills and foundries in 1969 totalled 36.9 million tons, less than the 37.9 million tons in 1951. Moreover, purchased scrap receipts were 34.1 million tons in 1970 and 32.9 million tons in 1971 (both significant decreases from the 1951 tonnage).

The issue in this case is recycling and the recycling impact is buried when the underlying details are ignored. The significant data have been placed in the record (V.S. 335-A) and they demand consideration.

10. The Commission has undertaken to generalize about technology and markets without being totally aware of the causes and effects it cites. For example, the growth of shredder technology, and its positive impact on the junk car problem, has seen the need for exports since many DOMESTIC MILLS SIMPLY CANNOT BE SERVED FROM THE COASTAL CENTERS OF POPULATION WHERE JUNK AUTOS ACCUMULATE, BECAUSE OF THE HIGH DOMESTIC FREIGHT RATES. Where the shredded scrap generated in California would go domestically in the absence of export markets is something this Commission should consider before it cites the shredder and other technological advances as the salvation of the obsolete metallic problem. It is one thing to process obsolete materials; it is quite another to sell the prepared commodity, and to sell requires the ability to deliver at reasonable freight costs.

11. It is shortsighted for this Commission to adopt the posture that *only* if it finds that its actions will "significantly increase" the recovery of secondary materials should it institute preferential rates or rate holddowns (p. 77). This Commission cannot believe that its environmental responsibility does NOT include protecting resource recovery from DECREASING yet further. If the Commission would study the data presented concerning home and purchased scrap, the conclusion of DECREASING markets would be obvious.

12. The Institute has indeed stated that recycling will remain a problem until sufficient markets exist for secondary products (p. 76), but what is *not* noted in the Commission's citation is the discussion of the two serious artificial hindrances to these viable markets for recyclable

metallics, one of which IS DISCRIMINATORY FREIGHT RATES. Scrap iron cannot be sold in many natural markets simply because the freight rate IS TOO HIGH.

13. The Commission has failed to understand that the scrap iron industry has *not* requested that all rates on scrap and ore be made equal (p. 75). What has been requested is parity in rate INCREASES to prevent a widening of the existing and unreasonable rate disparity between the two competitive commodities.

14. In the case of scrap iron, the railroads have *more* than the mere requirement to ". . . move commodities at just and reasonable rates and should make a reasonable effort, wherever practical, to promote the transportation of secondary materials" (p. 59), because scrap iron shippers are "captive" to the railroads. The Commission seems to have forgotten some of the rationale for establishing railroad regulation (in fact, whereas grain was the most easily exploitable commodity in 1887, scrap is possibly the most susceptible commodity at present because of its unique dependence on the one mode of transport).

Is the Commission saying that scrap iron, which is exhibiting the highest dependence on railroads of the recyclable materials, can be exploited without creating unreasonableness?

15. The Commission has created a special status for iron and steel scrap since it is alleged that ". . . we have held the rates on recyclables to no more than three percent" (p. 54), where, in fact, iron and steel scrap will be forced to absorb increases of up to 5%. Even the Commission itself reports a Commerce Department finding that iron and steel scrap has the highest sales figure of all recyclable materials and the short tons recycled by iron and steel scrap processors is cited from an EPA study as over three times the next nearest recyclable commodity (p. 72). Either the Commission has erred in omitting scrap iron from hold-down protection or these recycling figures are not describing a "recyclable" commodity.

16. The Commission applies one standard for the purpose of making a point and then, at a later occasion, repudiates that standard and adopts a second and contradictory standard to substantiate fallacious reasoning. For example, one would normally expect that the sharp jump in revenue per cwt. noted and highlighted on page 54 would carry the

warning footnote so proper in the discussion found on page 93. It seems entirely inappropriate and rather inflammatory to show a contrasting increase in revenues under recent general rate cases of 33% for ore and 9% for scrap at one point and then 50 pages later note that the average revenue FOR IRON ORE could be "OVER-STATED SIGNIFICANTLY." This, again, is poor practice for an advocate; it is unjustifiable for judges.

17. In the area of ferrous scrap, the Commission finds it proper to challenge the metallurgical calculations presented and to deny any holddown on ferrous scrap while it orders the granting of a holddown on nonferrous scrap without a record in that area even attempting to develop competitive metallurgical relationships (p. 148). It is not too much to expect that some Commission comment would have recognized the difference in the presentation concerning ferrous scrap where THIS VERY POINT IS AT ISSUE.

18. The Commission is very glib about ". . . the transportation advantages held by mines and mills with their regular shipments in multiple-car and trainload lots" (p. 169), yet at NO PLACE are these advantages detailed. Why are not the required cost and service statistics provided? Why are the only numbers shown those for data which have been adjusted without detailed explanation of the administrative procedures (p. 93)? Why has not the Commission demanded of its cost experts the same standard of proof it demands of advocates before it?

19. The Commission falls back on inciting language to defend its actions. Where have the figures been presented to show that rates on recyclable commodities are "at depressed levels" (p. 177)? No proponents of a holddown on scrap iron have indicated ". . . it is socially desirable that their movement be encouraged. . . ." at the expense of creating a burden for the carriers or other traffic (p. 177). Does the Commission argue the same way in the matter of low and below cost agricultural rates? What is the "cost-related pricing structure" (p. 177) noted, especially when the listing of ratemaking factors clearly discusses VALUE OF SERVICE which is entirely NON-COST RELATED (p. 26)? What does the Commission seek in the way of "costs and benefits of recycling versus

exploitation of virgin materials" (p. 178)? Could it be that the Commission is suggesting there is merit to exploitation of natural resources because of artificial constraints such as discriminatory freight rates which preclude the recycling of obsolete metallics that are hygenic, sanitary and aesthetic hindrances? No one asks the Commission to accept "as an article of faith, accusations which have not been rigorously documented" (p. 179). Rather the shipper of ferrous scrap is asked to accept "as an article of faith", Commission assertions that are wrong.

20. The Commission states that the relationship of rates to reflect iron content of the competing metallics to the steelmaking process is "a 'value of service' scheme carried to the extreme." (p. 185). It would be interesting to establish why rates on veneer and lumber are related (81 ICC 227). Why did the Commission find proper the relativity of rates on linseed oil as compared with those on cottonseed oil (109 ICC 721) and, on lard as compared with those on lard substitutes (95 ICC 171). The list could go on and on.

Why is it only with ore and scrap that this become a "value of service scheme carried to the extreme" (p. 185)?

CONCLUSION

The Institute repeats its contention that the Commission is acting as a proponent in this proceeding, not as judge. Accordingly, the basic precepts of due process require the opportunity for cross-examination of the alleged expertise which has been introduced by the Commission at the final stages of the deliberation process—*after* the record of evidence gathering has been completed. Thus, it is respectfully requested that the experts who prepared the Draft Environmental Impact Statement be made available for cross-examination by all interested parties and then, on a complete record, the Commission would undertake to prepare the required Draft Environmental Impact Statement.

Finally, it cannot be re-emphasized too strongly, that the Institute, speaking on behalf of the ferrous scrap processing industry, is asking ONLY for the same increases and hold-down on iron and steel scrap as has been accorded on iron

ore. Thus, while all other recyclable products are suggested to be held to a 3% maximum increase under Ex Parte No. 281, the increase sought for scrap iron would be 5% except, 4% in East (subject to a maximum of 22¢ per gross ton) and from South to East, and 3% to and within South (minimum 15¢ per ton).

BEFORE THE INTERSTATE COMMERCE COMMISSION

EX PARTE 281, INCREASED FREIGHT RATES, 1972

Comments on the Draft Environmental Impact Statement of the Interstate Commerce Commission, March 13, 1973

The Environmental Defense Fund, the National Parks and Conservation Association, and the Izaak Walton League of American (EDF, *et al.*) contend that the draft environmental impact statement, if adopted as a final statement without substantial modification to correct deficiencies discussed below, will not satisfy the requirements of the National Environmetal Policy Act of 1969, 42 U.S.C. 4321 *et seq.* (NEPA).

The comments of EDF, *et al.* were prepared by Dr. Talbot Page, an independent economist on the staff of Resources for the Future, Inc., with the assistance of the undersigned attorneys. Dr. Page also consulted several other economists. Dr. Page's criticisms of the impact statement are principally contained in Section II. They are summarized in Section I by the undersigned. The separate written criticisms of certain of the other economists are attached to these comments.[1]

I. *Summary of the Principal Deficiencies of the Draft Impact Statement*

There are three principal deficiencies in the draft impact statement. To a large extent these deficiencies are the same ones which have characterized the Commission's response to its obligations under NEPA throughout this rate increase proceeding. Even though the draft impact statement is considerably longer than the earlier statement

[1] Because of time constraints, certain written submissions have not yet been received. They will be supplied promptly upon their arrival.

The views expressed are, of course, those of Dr. Page and the economists consulted and have no necessary relationship to the institutions involved. The institutions are listed for purposes of identification.

of March 6, 1972, it nevertheless does not provide a sufficiently systematic, objective and thorough assessment of environment impact and alternatives to permit adequate independent evaluation and comment.

We have discussed the deficiencies which continue to prevent adequate compliance with NEPA in several prior submissions to the Commission in detail. See *Comments on Final Report and Order, Ex Parte 281, Increased Freight Rates and Charges, October 4, 1972* (October 29, 1972); *Comments on the Draft Environmental Impact Statement of the Interstate Commerce Commission submitted March 6, 1972* (April 6, 1972); *Special Protest and Request for Complete Compliance of the Commission with the National Environmental Policy Act* (March 30, 1972). Since the criticisms made in those earlier comments still apply, we will only briefly reiterate them here.

A. The most basic criticism of the draft impact statement is that it fails to reflect a sufficiently systematic approach to evaluation of environmental impact. See NEPA, Sections 102(2)(A), 102(2)(B), 42 U.S.C. 4332(A), 4332(B). The statement is not an objective document and the Commission did not employ adequate methodologies and procedures in preparing it, as discussed more fully in Section II.

The statement rather appears clearly to have been written in the spirit of advocacy to serve as justification for a decision which already has been reached by the Commission. This is not the purpose for which impact statements are required. To comply with NEPA, an impact statement must provide a full and unbiased disclosure of environmental considerations which then must be taken into account and balanced with other factors in reaching a decision. The Commission cannot meet this requirement by first deciding and then writing a brief on the environmental issues (which it calls an impact statement) in support of its decision.

B. The draft impact statement is also inadequate because it does not contain systematic examination of the effects of the underlying rate structure on the shipment and reuse of recyclable commodities. The Commission appears to maintain the position it has expressed previously that it is not required to evaluate the effects of the existing rate structure on the environment in considering rate increase

proposals. (Draft Impact Statement [DIS] 14-15). This position is plainly contrary to NEPA, as we have repeatedly emphasized and as the Council on Environmental Quality and the Environmental Protection Agency have advised the Commission. It is not sufficient to examine the additional environmental effects of the increment to existing rates. In order properly to assess costs and benefits of the proposed increases and examine alternatives, as Section II fully demonstrates, an evaluation of the effects of the full rates which are sought is necessary.

The draft impact statement does provide some discussion of the general factors which are involved in rate-making (DIS 15-54). It is apparent that the Commission does not contend that this broad discussion constitutes a sufficient evaluation of the effects of the rate structure on shipment and reuse of recyclable commodities since it explicitly defers that evaluation to another proceeding, *Ex Parte* 270, (DIS 14-15). For the reasons discussed in Section II of these comments, moreover, it could not seriously be asserted that the discussion in the draft impact statement is, in substance, a sufficient examination of the environmental effects of the rate structure. We have previously indicated our doubts that the proceeding in *Ex Parte* 270 will result in the necessary analysis of the rate structure. See *Comments of October 29,1972,* 5-6. Nothing which the Commission has thus far done in *Ex Parte* 270 has allayed those doubts. In any event, a comprehensive and systematic investigation of the rate structure must, under NEPA, occur *before* the Commission authorizes further increases on recyclable commodities.

C. A third, and related, criticism of the impact statement is the lack of adequate data upon which the discussion of the rate structure and the effects of proposed increases is based. The impact statement is replete with references to the lack of sufficient information. *E.g.,* DIS 93 (scrap iron and steel); 121 (textile wastes); 140 (glass); 68 (diversion of shipments to trucks and consequent air pollution problems).

As we have also consistently maintained, it is the Commission's responsibility to develop adequate data upon which a proper analysis can be based. Our contention is not and has never been, either: (1) that an adequate environmental impact statement cannot be prepared unless all

desirable data have been developed and collected; or (2) that the Commission itself must develop all the necessary data. The point is that the Commission has the obligation under NEPA to insure that sufficient data to permit informed judgments are developed and collected. The Commission must assume the initiative to insure that sufficient data for a systematic and thorough analysis exist. It has adequate statutory investigative powers to require the railroads to submit specific information and it may, as other agencies have, develop data itself. See *Comments of April 6, 1972*, 15-19.

The Commission has, however, repeatedly refused to exercise its responsibilities under NEPA. It has, in short, insisted that it may "sit back, like an umpire, and resolve adversary contentions." *Calvert Cliffs Coordinating Comm.* v. *Atomic Energy Comm'n*, 449 F.2d 1109, 1119 (D.C. Cir., 1971). Thus, while the Commission has repeatedly asked the parties for data, it has, to our knowledge, neither indicated to the railroads (who presumably have greatest access to necessary information) the specific data needed before it can reach an informed judgment on their rate increase proposals nor has it developed the data independently.

The only independent research by the Commission of which we are aware is a literature search which culminated in the bibliography attached to Appendix A to the draft impact statement. While such a literature search is a desirable and necessary first step in the required environmental analysis, the evident fact that it has been the Commission's only independent effort underscores the inadequacy of its efforts under NEPA. Until the Commission meets its responsibilities to insure an adequate data base, it is impossible for it to prepare an adequate impact statement or otherwise to comply with NEPA.

D. We are, finally, constrained to object to the draft impact statement's mischaracterization of the position of EDF, *et al.* and other environmental interests in this proceeding as impractical and "one-dimensional" (DIS, 8-9). EDF, *et al.* seek a thorough objective assessment by the Commission of the environmental effects, principally on recycling, of the proposed rates (including the underlying rate structure) and of alternatives to further increases on recyclables. NEPA requires nothing less.

We do not maintain that alteration of freight rates is the sole answer to the problem of recycling. We do contend that there is reason to believe that they create a disincentive to recycling of numerous commodities and that, at a minimum, the apparent discrimination against those commodities should be explored in a rigorous and objective way.

Nor do we contend that the only factor to be considered in assessing whether rate increases on recyclable materials should be permitted is the environmental interest. However, we fail to see how it is possible to balance the various factors which must be taken into account, including the environmental factors, until a proper environmental analysis has taken place. And, in the circumstances here, we believe that the proper solution, as the Council on Environmental Quality has earlier suggested, is to refuse to permit rate increases on recyclable commodities (while exploring alternative measures to insure the railroads have adequate revenue) until a proper environmental analysis has taken place so that the balancing of environmental, economic and other factors which NEPA contemplates may occur.

II. *The Draft Environmental Impact Statement Does Not Adequately Analyze or Disclose the Effects of Proposed Rate Increases and the Underlying Rate Structure*

A. The Commission Has Not Employed An Adequate Methodology For Evaluating the Effects of Its Rates on Recycling

In their comments on the Commission's draft impact statement of March 6, 1972, EDF, *et al.* pointed out that the Commission had not employed an adequate methodology for evaluating the effects of the rates on recyclable materials it permits the railroads to charge, much less performed the necessary research. Because of these omissions by the Commission, EDF, *et al.* discussed an appropriate methodology. See *Comments on the Draft Environmental Impact Statement of the Interstate Commerce Commission submitted March 6, 1972* (April 6, 1972), 21-30. The Commission has also failed in the present draft statement to employ an adequate methodology or to conduct the indicated research. Accordingly, our earlier comments and suggestions on methodology apply fully to this draft.

Before writing their comments to the first Draft Statement EDF, *et al.* sought the advice of two economists, Dr. Paul MacAvoy (MIT) and Dr. Talbot Page (Resources for the Future). Since last March, EDF, *et al.* has had time to seek the advice of several other economists interested in transportation economics: Dr. Merton Peck (Yale), Dr. Anne Friedlaender (MIT), Dr. Tom Moore (U. of Chicago), and Dr. Roger Noll (Brookings). The methodology of how to go about a study of the impact of freight rate increases upon recycling is quite straightforward, and generally agreed upon by economists. The consensus was that the methodology outlined in the original comment and restated below is indeed the way to estimate the impact of freight rates on recycling.

1. *Methodology*

a) *The first step is to compute the fraction of the cost of each important scrap material which is due to transportation.*

1) For the scrap commodities most important to recycling, compute the total cost of each at a point in processing after transportation where it substitutes for its virgin competitor. For example, scrap aluminum delivered to the door of U.S. Reduction might be worth 15¢/lb. Even though (virgin) metal is derived from bauxite, the metal scrap is already competing against primary metal. This can be seen from the fact that a change in price of a primary ingot will affect the demand by U.S. Reduction for scrap metal at its door.

2) At this same point in processing, compute the fraction of the cost of the scrap material which is due to transportation charges. For example, if the freight charge for scrap aluminum is 2½¢/lb., the fraction would be 17 percent.

b) *The second step is to investigate the effect of the price of scrap on the quantity of scrap shipped.*

In the economist's language, the second step is to estimate the elasticity of demand for the important types of scrap material. The elasticity of demand is defined to be the percent decrease in quantity demanded resulting from a 1 percent increase in the price of scrap. A more sophisticated analysis would require investigation into other price sensitivities.

c) *Once the first two steps are completed an estimate of the effect of rate alterations on recycling can be calculated simply.*

For illustration, suppose that the elasticity of demand for aluminum scrap was found to be 4. (A 1% increase in the price of scrap leads to a 4% decline in the amount demanded.) Suppose also that the railroads are contemplating a 5% increase in the freight rate for scrap aluminum. A 5% increase in the freight rate would then imply a $(5\%) \cdot (17\%) = .9\%$ increase in the price of scrap. With an elasticity of 4, this price increase means a $(4) \cdot (.9\%) = 3.6$ percent decline in recycling. Similarly, calculations of the expected increase in recycling from rate decreases could be made.

EDF, *et al.* have no illusions that the task of estimating the impact of freight rate increases upon recycling, especially step two, is not formidable or can be done with absolute accuracy. But NEPA clearly requires a more serious and substantial effort than the Commission has thus far made. Nor is the required task impossible. As Professor Friedlaender points out in the attached comments, "[e]stimates of the relevant elasticities could be made using standard econometric and economic techniques and would yield highly desirable information to make it possible to assess the impact of the current rate structure upon the use of recycled materials" (Appendix A, p. 3). Moreover, an investigation by the Commission into price-quantity relationships might disabuse the Commission of such economically senseless notions as: (1) that scrap and virgin materials do not compete; or (2) that the amount of scrap shipped is somehow independent of the rates charged.

2. *The CC Investigation*

Research along the lines of the above three steps should be undertaken for the most important recyclable commodities, and certainly for iron and steel scrap, which comprises the largest volume of rail scrap shipments. Even though the original 6-page Draft Statement has expanded into a 237-page Draft Statement there is still no analysis, however rudimentary, of the fractional component to scrap cost attributable to transportation, nor of price sensitivities (elasticities). Without the necessary analysis there is no

basis upon which the ICC can judge the impact of freight rate increases on recycling. And without having taken even the first step toward estimating the impact, the second draft remains as inadequate as the first.

While the Commission apparently has not made its own study of the sensitivity of scrap shipments to price, the required investigation is possible. Some work has already been done outside the ICC. A major portion of *A Regional Analysis of the Automobile Scrap Processing Sector of the Economy*, a Ph.D. dissertation by James Sawyer (then at University of Pennsylvania, now at Resources for the Future), is devoted to understanding the price sensitivity of scrap and steel supply shipments. His conclusion was that the sensitivity of scrap shipments was very high: he estimated that the supply elasticity ranges between 5 and 20, depending upon market conditions.

Price response studies are made more difficult by the fact that not only the price of scrap is changing. The Commission also needs to consider the effect of rate increases for primary ore and other competing virgin materials on scrap shipments. Although consideration of these problems (cross-elasticity effects) makes the analysis more complex, there is ongoing research which sheds light on this question, which the draft statement also neglects. For example, Clifford Russell (Resources for the Future), has constructed a linear programming model of steel producing firms which have some choice of processing (*e.g.*, BOF or electric), and can choose between inputs of scrap or virgin material. Preliminary analysis indicates that the demand for scrap iron and steel is very sensitive to the price of iron ore.

The extensive bibliography attached to the impact statement (Appendix A) contains little, if any, reference to price sensitivity research, and does not include either study referenced above.

Instead of performing its own price response studies or evaluating ones done elsewhere, the ICC has contented itself with assertions regarding the effects of railroad rates and increases to them, which are supported by nothing more than general and inconclusive discussions. At times, there is a hint that the Commission might be on the right track. For example, the statement points out: "Admittedly, the low value of these discarded waste commodities means that the freight rates tend to represent a high percentage of

their value" (Impact Statement 74). But then the next sentence asserts: "Nevertheless, we have been unable to find evidence that secondary commodities either are being diverted to other modes of transportation or are not moving as a result of past rail freight rate increases." Throughout, the Commission relies upon the lack of information to justify its conclusions of no environmental effect. The statement concludes ". . . we do not find persuasive support for the allegation that increased freight rates on scrap paper will affect its movement for the purposes of recycling" (DIS, 118).[2]

The Commission ultimately concludes, despite the fundamental failure to employ an adequate methodology to analyze the basic issues, that "our draft statement herein reflects our effort to satisfy the requirements of NEPA. We have exhausted every reasonable method of examination to assure concerned citizens that all issues have been carefully and thoroughly considered. . . . In addition, all available literature on this subject has been carefully studied" (DIS, 6). And, it reaches the ultimate conclusions that "based on all the considerations set forth in this section of our present report, that the approved rate actions will have no significant impact on the quality of our human environment. . . . Neither does it appear that any recyclable materials are likely not to be moved as a result of our actions" (DIS, 197).

With neither research to compute the fraction of transportation in the cost of scrap commodities nor research on the price sensitivity of scrap commodities, such conclusions upon the effect of rate increases stand as empty assertions. In place of the required research are rambling, and sometimes interesting, discourses, on scrap markets and technologies. Much of this discussion is only marginally relevant to the basic question of the impact of rates upon recycling. At least, the basic research and analysis must take place before these discussions can be placed in a meaningful context.

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[2] The same theme is repeated, for example, with respect to petroleum wastes ("The adopted increases on these commodities will not in our judgment affect the movement of these commodities for recycling purposes", DIS 132) and for nonferrous metals ("We do not find that a 3 percent increase, which will keep rates below a 1963 level, will in any manner slow the movements of the commodities for the purpose of recycling and reclamation", DIS, 148).

Neither is there a discussion of the role of relative costs of scrap and virgin materials costs including transportation upon the selection of technology and subsequently the utilization of scrap in the future. Choice of technology is particularly important in the steel industry, where the relative prices of ore and scrap in large part determine whether Basic Oxygen Furnaces (using up to 35% scrap) or electric furnaces (using up to 98% scrap) will be developed in the next decade.

Economists tend to agree that price sensitivity studies are much more difficult than computing components of scrap costs due to transportation. They also agree that without these studies there is simply no way to estimate the impact of freight rate increases upon recycling. The ICC has failed in its responsibility to estimate the impact of rate increases on recycling. If the ICC had fulfilled this responsibility it could then weigh the estimated adverse effect on recycling against possible justifications. We discuss possible justifications in rate differences, and hence justifications for differential rate increases, in the next section.

B. Cost Justifications for Rate Difference Are Not Adequate

In their comments on the original Draft Statement, EDF, *et al.* stated that rate differences could be justifiable if they reflected differences in the cost of transportation. *Comments on the Draft Environmental Impact Statement of the Interstate Commerce Commission submitted March 6, 1972* (April 6, 1972), 21A-22.[3] In its second Draft Statement, the ICC lists several bases for rate-making (DIS 19-39), which boil down to three:

1) The cost of shipment, also called out-of-pocket costs or marginal costs;

2) Demand for the commodity, also called value of service, what the traffic will bear, discriminatory monopoly pricing, or demand pricing; and

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[3] This position contrasts sharply with the one attributed to it by the second Draft Statement: "[T]he environmentalists maintain that rates on secondary materials (which assertedly should move in greater volumes for recycling purposes) ought to be preserved and protected (if not lowered) *at all costs.*" (emphasis added) (DIS, 9).

3) Public interest, either on a local or national level.

In spite of the fact that the Commission maintains that there are several bases for rate making, the Commission justifies differences in rates between primary and competing secondary commodities almost entirely on the sole basis of differences in cost of shipment. EDF, *et al.* are pleased to find this emphasis because all the economists polled agreed that rates should be based more on costs than they are presently. Nevertheless, there are two basic deficiencies in the draft impact statement's cost justifications for rate differences:

1) The analysis is cursory and performed without a stated methodology. Often, only conclusions are stated. As such it does not permit independent and comparative evaluation.

2) The results are inconsistent with analysis of transportation costs and rates published earlier by the ICC.

In principle, a freight rate is made up of two parts: out-of-pocket costs of shipment of the particular commodity and contribution to overhead. For rate differences between primary and secondary commodities to be justified on the basis of cost, the contribution to overhead should not be more for secondary commodities than for primary ones. The ICC has completed two studies, called burden studies, comparing the costs of shipment with actual rates charged. It has stated:

> The variables costs [corresponding to the out-of-pocket costs] reflect the average switching conditions and average train operations of the territories in which the traffic moved, the average weight of load, the average length of haul, the type of equipment and the empty-return movement of the equipment. It is believed that recognition of these transportation characteristics in the application of the costs is sufficiently representative of the costs incurred by the carriers for transporting the major portion of the commodity classes. (Ex Parte No. 270 "Investigation of Railroad Freight Rate Structure," Nov. 11, 1971)

The ratio of revenue received (rates) to variables cost is, then, a measure of the contribution to overhead. Results of the two studies are shown below:

Burden Studies
Revenue as a percentage of variable cost

	1966	1969
Iron and Steel Scrap	155	142
Iron Ore	143	130
Beneficiating grade ore, crude	62	99
Paper Waste and Scrap	123	115
Primary forest products	83	75
Pulpwood and other wood chips	84	83
Pulpwood logs	80	69
Waste and Scrap, except ashes	144	140
Copper ores	114	176
Crude copper ores	45	151
Lead and Zinc ores	144	134
Bauxite	111	111
Manganese ores	128	137
Dimension stone, quarry	152	119
Crushed and broken stone	92	86
Sand	89	80
Gravel	80	75
Phosphate Rock	75	72

Secondary commodities underlined
Sources: Ex Parte 270 "Investigation of Railroad Rate Structure" (Burden studies) 1966 and 1969 data from the ICC Waybill Sample

For both years and for nearly all cases, scrap commodities contribute more to overhead than primary commodities. By the Commission's data, many primary commodities do not even pay their own way (their variable costs). While paper waste pays 123% of its variable cost of shipment, on average, pulpwood logs pay only 80% of the variable cost of shipment. If the Commission analysis is correct, secondary materials are, in effect, subsidizing primary commodities.

The Commission sees no reason why primary commodities should subsidize secondary ones:

> In the circumstances for us to attempt to hold the rates and charges on recyclable commodities at depressed levels, upon some theory that is is socially desirable that their movement be encouraged, would

cast a burden on the rates and charges applicable on the remaining commodities that the railroads transport or, as some of the parties suggest, the primary materials. In effect the shippers of such commodities would be asked to underwrite or partially subsidize the transportation of the recyclable commodities. (DIS, 177)

How then can the Commission be satisfied with the present system of rates, under which secondary material appears to subsidize primary material? The draft statement fails to reconcile the results of its own two burden studies with its "findings" that rate differences are explained in terms of cost. Indeed, the statement fails even to discuss these two studies.

It is not clear that the rate structure should be used to subsidize any commodity at the expense of the other (criterion (2) demand pricing and criterion (3) public interest inevitably do this). But it would seem that if any commodity should be subsidized at the expense of others, scrap commodities should receive the benefits rather than carry extra burdens. For, Congress in Section 101(b)(6) of NEPA has declared that it is national policy, and hence in the public interest to "approach the maximum attainable recycling of depletable resources." 42 U.S.C. 4331(b)(6). The Commission also cites its "previously articulated environmental policy to urge that the railroads make a serious effort to design incentive rates which can facilitate the movement of recyclable commodities" (DIS, 179).

While economists agree that there should be more reliance on cost pricing (criterion (1)), they differ on the amount of demand pricing (2) and national interest (3) should be mixed into the "optimal rate base." However, it appears that a partial reliance on demand pricing also should favor scrap commodities in comparison to rates based solely on costs. Demand pricing says charge what the traffic will bear; charge higher rates to those commodities which have lower elasticities of demand. Scrap commodities, being of low value, will not bear high rates; elasticities of demand are probably higher for scrap than for primary commodities, being of low value, will not bear high rates; elasticities of demand are probably higher for scrap than for primary commodities, and consequently demand

pricing should lead to lower rates, relative to primary ones, than would obtain under a pure cost based rate system.

Cost based rates require the same contribution to overhead by each commodity. Demand pricing and national policy suggest, if anything, that secondary material should pay less toward overhead than primary. Criteria (1), (2), and (3) together appear to imply that if there is to be a departure from equal contribution to overhead, scrap should contribute less than primary. Yet the ICC's own data indicate that scrap contributes more, not less, to overhead. In the draft statement the Commission concludes that the proposed increases are just and reasonable (and, hence, that the present structure is just and reasonable). In its final Environmental Impact Statement the ICC should reconcile its conclusions about reasonable rate increases with its own burden studies.

C. There Has Been Inadequate Discussion of Alternatives

The draft impact statement does not adequately assess reasonable alternatives to further increases in rates on recyclable materials.

The Commission seems to think that all the environmentalists want to do is hold down rates on scrap commodities (DIS, 9, 1969, 177). This view is erroneous. EDF, *et al.* believe that the rate structure should be fair to recycled commodities and should properly accommodate Congress' goal of encouraging recycling with other important existing policies. We do insist, however, that the Commission must prepare an Impact Statement in which the costs and benefits of the alternatives are explicitly and objectively set forth before it (and the public and Congress) can adequately assess the rates.

Once the facts are fully and objectively set forth, it may be, as the Commission asserts, that other governmental measures (instead of or in addition to alterations of the rate structure) will be necessary to promote recycling. But the fact that other measures, some outside the Commission's authority, are appropriate alternatives does not excuse the Commission from discussing them and from considering those within its power in fully sufficient detail.

EDF, *et al.* believe that particular attention should be devoted to two alternatives.

1. One obvious alternative, unaccountably neglected in the second draft statement but mentioned in the EDF comments on the first draft statement (where it was also omitted) is to increase rates for primary commodities. The ICC makes much of the health of the railroads as being a worthy environmental goal and hints that more favorable rates for scrap worsens the railroads' financial position. Most environmentalists would agree that railroad health is indeed a worthy goal but would disagree that more favorable rates for scrap necessarily conflict with this goal. The obvious fact is that higher primary rates are more favorable to recycling. When the primary rates do not even cover variable costs, higher primary rates will also improve the railroads' financial position. The two goals are not mutually exclusive.

One of the most striking things about the two burden studies is that many commodities do not even pay their own variable costs. This is economically irrational if railroads are trying to increase their revenues. They would be better off, financially, by at least raising rates to the level of variable costs.

Many economists have argued that demand pricing over the years has worsened the railroads' health, by encouraging the railroads to compete and subsidize traffic they are least suited to carry. The ICC should consider moving away from demand pricing toward criteria giving greater emphasis on cost pricing, as well as the national interest in recycling. One possibility would be to establish rate increases which would at least equalize the contribution to overhead for primary and secondary commodities.

2. A second alternative is deregulation of motor carriers to permit them more easily to carry recyclable commodities. Motor carriers are burdened by a certificate process which restricts what commodities can be carried and to which destinations. The certificate process results in empty backhauls, inefficient routings, and less competition, according to many transportation economists. The environmental advantages of rail over trucking claimed by the ICC (energy saving and the like) should be weighed against the elimination of present inefficiencies (empty backhauls and the like) and the advantage of greater recycling. Reducing certificate restrictions might increase recycling and serve the national interest generally. The ICC should consider

various forms of deregulation (by Congress) of vegetable produce is just one example, and discuss this in the impact statement. A move toward deregulation in trucking could affect railroad rates. The ICC should consider these effects and such possible methods of achieving them as modification or elimination of the Reed-Bulwinke Bill, 49 U.S.C. 5b, among other existing legislation.

III. *Conclusion*

The draft impact statement is not adequate to permit informed evaluation and comment. The Commission should develop or obtain sufficient data and prepare a revised statement which objectively evaluates the impact of the proposed rate increases and the underlying rate structure on transportation and reuse of recyclable commodities in accord with an acceptable methodology, such as described above. It should further explore reasonable alternatives, including those discussed above, in adequate detail.

Because the public has still not had an opportunity to comment on an adequate draft, the new statement should be issued as a draft. In view of the public importance of the issues involved, the Commission should conduct public adversary hearings on the statement at which the persons within the Commission responsible for preparation of the statement, among others, may be cross-examined.

The Commission should grant no further rate increases on recyclable commodities until it has prepared and circulated the new draft, conducted hearings and otherwise permitted adequate public comments, and issued a final impact statement under NEPA which appropriately considers the comments and criticisms of the revised draft.

Respectfully submitted,

/s/ John F. Dienelt
JOHN F. DIENELT
Scott H. Lang

Counsel for EDF *et al.*

1712 N Street, N.W.,
Washington, D.C. 20036

APPENDIX A

MASSACHUSETTS INSTITUTE OF TECHNOLOGY

Department of Economics

Cambridge, Massachusetts 02139

April 6, 1973

Mr. Talbot Page
Environmental Defense Fund
1712 N Street, N.W.
Washington, D.C. 20036

Dear Mr. Page:

As an economist interested in transportation and environmental problems, I would like to comment upon Ex Parte 281, concerning rates on recycled materials. In analyzing the merits of a given rate structure with respect to recycled materials, there are two distinct, but related questions:

1) Are the rates on recycled materials discriminatory?
2) What would be the impact of altered freight rates upon the use of recycled materials?

If an analysis of the rates on recycled as opposed to virgin materials indicates that recycled materials are discriminated against, that should be sufficient cause to reduce rates on recycled materials. Moreover, if an analysis of the impact of freight rates upon the use of recycled materials indicates that their use is sensitive to freight rates, that may be sufficient cause to reduce rates on recycled materials; or at least sufficient cause not to raise rates on recycled materials.

Unfortunately, Ex Parte 280 does not address these questions directly. However, an analysis of the cost and demand relationships for recycled and virgin materials is necessary to enable answers to the questions asked above.

In particular, it is highly desirable to know if the present rate structure with regard to virgin and recycled material is discriminatory. This is a difficult question to answer both conceptually and factually. On a conceptual level, several definitions of discriminatory pricing are possible.

The most usual one considers the relationship between rates or prices and marginal costs. If the marginal costs of two activities are similar, but the rates of one are higher than the other, the commodity with the higher rates can be said to be discriminated against. While formally correct as a definition of discrimination, this approach fails to recognize that some form of price discrimination is probably inevitable in an industry such as transportation that carries commodities with widely different attributes. Recent economic analyses have shown that regulated enterprises should generally try to relate prices to marginal costs in such a way that the price-marginal cost ratios are inversely related to the elasticities of demand. Roughly speaking, this implies that two commodities with the same transport costs and the same demand characteristics should have roughly the relation of rates to costs. Thus the rates relative to costs of two commodity types (i.e. their ratio of revenues to out-of-pocket costs) should be inversely related to the elasticity of transport demand of these commodities.

Consequently, to determine whether the rates on recycled materials are discriminatory, the ICC should estimate the ratios of revenues to out-of-pocket costs for recycled and virgin commodities and estimate the elasticity of demand for transport service on the part of recycled and virgin materials. If the relationship of revenues to out-of-pocket costs is higher for recycled materials than virgin materials, and if the elasticity of demand of recycled materials is higher than that of virgin materials, there is a strong presumption that recycled materials are discriminated against. If, however, the ratios of rail revenues to out-of-pocket costs are proportionately inversely related to the respective elasticities of demand, it is more difficult to argue that the rate structure is unduly discriminatory.

Although it is generally agreed that there are serious problems associated with the ICC's estimates of out-of-pocket costs, we can accept the ICC's estimates of the ratio of rail revenues, to out-of-pocket costs as being indicative of the relevant price-marginal cost ratios. Thus to determine whether the rate structure is discriminatory, the ICC would have to estimate the elasticity of demand of transport services on the part of recycled and virgin materials. While a difficult task, it is certainly not impossible

and well within the realm of standard economic and econometric analysis. Thus I strongly recommend that the ICC undertake such a study.

To analyze the impact of rate change upon recycled materials two pieces of information are needed: first, the elasticity of demand with respect to price of recycled materials; second, the proportion of freight costs in the value of recycled materials. The elasticity of demand indicates by how much demand will respond to a given percentage change in the final cost or price of recycled materials, while the proportion of freight costs indicates by how much a given freight rate change will be reflected in a price change. Suppose, for example, that the proportion of freight charges in the final costs or value of recycled material is 25%, and the elasticity of demand of recycled materials with respect to price is estimated to be −2.0. Then a 10% reduction in the rate on recycled materials relative to virgin materials will lead to a 2.5% reduction in the price of recycled materials and a 5% increase in its use.

The ICC generally estimates the proportion of freight (rail) costs in the final value of a product. Thus an additional analysis of the elasticity of demand for recycled materials with respect to price would enable it to analyze the impact of rate change upon the use of recycled commodities. If such a study indicated that the elasticity of final demand with respect to rates was quite high on the part of recycled materials, environmental considerations should dictate that the ICC should take this into account in considering rates.

In conclusion, four pieces of information are needed to assess the present rate structure with respect to recycled materials:

(1) The ratio of revenues to out-of-pocket costs of recycled and virgin materials.

(2) The elasticity of *transport* demand with respect to rates and recycled and virgin materials.

(3) The proportion of freight costs in the final value of recycled and virgin materials.

(4) The elasticity of *final* demand with respect to recycled and virgin rates on the part of recycled and virgin materials.

With this information it would be possible to determine whether the existing rate structure is discriminatory, and

whether the rate structure could have a significant impact on the use of recycled materials. The ICC should have data on the first and third items. Estimates of the relevant elasticities could be made using standard econometric and economic techniques and would yield highly desirable information to make it possible to assess the impact of the current rate structure upon the use of recycled materials.

Sincerely yours,

/s/ Ann F. Friedlaender
ANN F. FRIEDLAENDER
Visiting Professor

AFF/vs

UNITED STATES OF AMERICA
BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 281, Increased Freight Rates, 1972

COMMENTS OF S.C.R.A.P. ON THE
DRAFT IMPACT STATEMENT

Students Challenging Regulatory Agency Procedures (S.C.R.A.P.) submits the following comments to the Commission on the Commission's Draft Environmental Impact Statement served in this proceeding:

1. S.C.R.A.P. is astounded and disappointed that the Commission could, at this late date, adamantly refuse to consider the environmental impact of the underlying rate structure, and look only to the impact of the incremental increases. Clearly, the National Environmental Policy Act of 1969, and the Council on Environmental Quality Guidelines implementing it require the Commission to analyze the impact of the increases in this proceeding in the context of the impact of the underlying freight rate structure. This point has been made so often to the Commission in our previous comments and in legal briefs in court, that it is quite disturbing for the Commission to fail to consider the rate structure. Congress, in passing the National Environmental Policy Act, clearly intended this Commission to evaluate the impact of the underlying rate structure and not merely the impact of each incremental increase. While the harm to the environment from each incremental increase may not be overwhelming, the harm caused by the underlying rate structure, as aggravated by the incremental increase, may very well be overwhelming. It is apparent from the Commission's draft environmental impact statement that the Commission does not now know what impact the rate structure has.

2. Another objectionable feature of the Commission's draft impact statement is that the burden of proving a significant environmental impact is apparently still placed

by the Commission upon the environmental interests in this proceeding. It is the protestants who must convince the Commission of a significant impact, rather than, as the National Environmental Policy Act clearly intended, the Commission itself determining whether a significant impact exists. This misallocation of the burdens of persuasion and proof is only part of a larger problem, the adversarial nature of this document. It is apparent that the Commission has written its draft impact statement to support its prior conclusion that the rate increases would have no impact. The Commission clearly has not written this draft impact statement to inform itself, members of the public, and other agencies, of the potential impact of its actions.

3. Finally, S.C.R.A.P. would like to bring to the Commission's attention the Environmental Protection Agency Report To Congress On Resources Recovery, dated February 22, 1973. The recently issued report bears upon the issues involved in the draft environmental impact statement, and should be consulted and considered by the Commission.

Respectfully submitted,

/s/ Peter H. Meyers
PETER H. MEYERS
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(202) 676-7229
Attorney for S.C.R.A.P.

DATED: April 11, 1973

COPPERWELD STEEL COMPANY

Executive Offices

Frick Building, Pittsburgh, Pa. 15219

Irving M. J. Kaplan
Administrative Vice President
and Secretary

April 12,1973

Mr. Robert L Oswald, Secretary
Interstate Commerce Commission
Washington, D.C. 20423

Subject: Ex Parte No. 281
Reference: Notice to Parties
Service Date March 12, 1973

Dear Sir:

Copperweld Steel Company wishes to submit the following comments on the Report of the Commission and the Draft Environmental Import Statement:

1. On page 90, second paragraph, it is clearly stated that pig iron and scrap are similar in ferrous content and can be substituted for each other to a significant degree;
2. Copperweld wishes to point out that, similarly, scrap, when molten, can be substituted for molten pig iron smelted from iron ore;
3. The interchangeability of these materials in the steelmaking furnaces of integrated producers is a matter of comparative economics;
4. In periods of low steel production and ready availability of hot metal smelted from iron ore, integrated producers favor hot metal thereby driving down the price of scrap until it again becomes relatively attractive as a substitute for hot metal;
5. Since freight costs are a sizeable fraction of the value of scrap—representing 10% to 15% of the price on movements of approximately 100 miles—it is impera-

tive that freight rates increases be held comparable to those on iron ore and that the same hold-down of 22 cents per gross ton be applied to ferrous scrap as applied to iron ore;

6. If the hold-down is applied to ferrous scrap rates, the integrated producers will attract scrap from a greater area and in greater quantity thereby helping to preserve and maintain the environment.

Steel-making plants having furnaces which charge only ferrous scrap will also benefit from the hold-down with a resultant benefit to the environment.

Very truly yours,

/s/ Irving M. J. Kaplan
IRVING M. J. KAPLAN

BEFORE THE
INTERSTATE COMMERCE COMMISSION

EX PARTE 281
INCREASED RATES AND CHARGES, 1972

COMMENTS OF NATIONAL ASSOCIATION OF SECONDARY MATERIALS INDUSTRIES, INC. REGARDING THE COMMISSION'S DRAFT ENVIRONMENTAL IMPACT STATEMENT

The National Association of Secondary Material Industries, Inc. (NASMI) hereby submits the following comments regarding the Commission's draft environmental impact statement released on March 13, 1973. NASMI urges the Commission to reconsider the said impact statement, and upon such reconsideration, to reject same for all of the reasons hereinbelow set forth.

I.

All Proceedings In This Case Since Issuance Of The Commission's Order Of November 7, 1972 Are Null And Void And Violative Of Both The Interstate Commerce Act And The Administrative Procedure Act In That The Commission Has Insisted On Proceeding Absolutely *Ex Parte*, It Refused To Hold Any Hearings, And Finally, When An Interested Party (NASMI) Actually Attempted To Furnish Information And Materials For The Commission's Consideration, That Submission Was Totally Ignored.

In its Order of November 7, 1972 herein, the Commission recognized NASMI and eight others as "interested parties", vitally concerned with the matters now before the Commission for adjudication. The said Order thereupon went on to direct—

1) that Ex Parte 281 be reopened for the purpose

of "further evaluating, in accordance with the National Environmental Policy Act of 1949. . . .the environmental effects of increased railroad rates and charges on the movements of commodities being transported for the purpose of recycling";

2) that "because there is reason to believe that the tariff schedules identified in the appendix to this order may, if permitted to become effective, result in rates and charges, rules, regulations, or practices which would *not* be in conformity with the report in Ex Parte No. 281 . . . *as modified by this order, an investigation be, and it is hereby, instituted into and concerning the rates, charges, and regulations contained in said schedules, with a view to making such findings and circumstances shall warrant"; and*

3) that *"the investigation in this proceeding shall not be confined to the matters and issues hereinbefore stated as the reason for instituting this investigation, but may include all matters and issues with respect to the lawfulness of the said schedules under the Interstate Commerce Act";* and accordingly,

4) that "the operation of the said schedules be, and it is hereby, suspended, and . . . the use thereof in interstate and foreign commerce be deferred to and including June 10, 1973".

Having ordered such an investigation into the lawfulness of the rates here involved and having suspended such rates under the Interstate Commerce Act for the purpose "of making such findings and orders as the facts and circumstances shall warrant", including principally the facts and circumstances surrounding "the environmental effects of increased railroad freight rates and charges on the movements of commodities being transported for the purpose of recycling", the Commission was bound by the Interstate Commerce Act (49 U.S.C. §15) to develop those facts and circumstances through the normal hearing procedures prescribed by Congress for such cases.

The Commission, however, has unfortunately failed and refused to hold any hearings of any kind. Rather it has insisted on proceeding absolutely *ex parte*. And, when NASMI, a recognized "interested party", filed information and materials for the Commission's consideration, that information and those materials were completely ig-

nored by the Commission in its draft environmental impact statement of March 13, 1973.

In this regard, the Commission's attention is directed to the attached letter dated February 5, 1973 (*Exhibit A* hereto) which counsel for NASMI filed with the Commission. After referring specifically to the Commission's aforementioned order, the said letter made the following inquiries:

> "1. Has the said investigation referred to in the Commission's order of November [7], 1972 actually commenced?
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> 2. If so, when will a hearing or conference be held at which interested parties such as NASMI will have an opportunity to present facts and evidence relevant to the subject matter of said investigation?
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> 3. If no hearing is to be held, how and when may interested parties such as NASMI present facts and evidence relevant to said investigation for the Commission's consideration?
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> "Your prompt advice will be appreciated, especially since 3 full months have already passed since the date of the Commission's order and NASMI has received no notice of any kind as to how and when interested parties may effectively participate in the Commission's announced investigation."

On February 9, 1973, the Commission responded to this letter, stating that "No . . . hearings or conferences are contemplated at this time" (See *Exhibit B* hereto). The Commission also erroneously complained in that letter that it had asked NASMI to supply bibliography maetrial for the Commission's consideration on December 4, 1972, but NASMI had failed to cooperate.[1] The record shows, however, that NASMI did indeed respond to the Commission's said request on December 19, 1972, and it directed the Commission's attention to seven specific works dealing with the environmental issues here involved (See *Exhibit C* hereto). In fact, NASMI went on to advise the Commission in its letter of December 19:

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[1] In its draft environmental statement of March 13, 1973, the Commission again indicates, at page 6 (footnote 6), that NASMI failed to respond to this bibliography request of December 4, 1972.

"The Commission can be assured of our wholehearted cooperation in any way we can be helpful relative to your research activity, and in this connection feel free to call upon our recycling experts if the neeed should arise."

Unfortunately, however, the Commission has elected to continue to act entirely on its own and completely *ex parte* to date. It has held no hearings. It has called no "recycling experts" to testify regarding the true facts and circumstances here involved; it has produced no record or transcript to support the voluminous findings contained in its draft statement of March 13, 1973; and it has not subjected any of its said findings to the test of cross-examination.

NASMI respectfully submits that such procedures are basically unjust and unfair and they are violative of both the Interstate Commerce Act and the Administrative Procedure Act, federal statutes under which the Commission regularly operates in rate investigations, such as the instant proceeding triggered by the Commission's order of November 7, 1972. By that order, the Commission carefully suspended the selected rate increases here involved for seven months and scheduled a formal investigation "to make such findings and orders as the facts and circumstances warrant" regarding "the lawfulness" of the suspended rates. In such cases, the Interstate Commerce Act itself (49 U.S.C. §15(7)) makes it mandatory for the Commission to afford the interested parties a hearing before it makes it findings and issues orders adjudicating the legality or illegality of the rates under investigation.

Moreover, in cases of this nature, the Administrative Procedure Act (5 U.S.C. §§554-556) is likewise fully applicable. That statute, combined with the aforementioned requirements of the Interstate Commerce Act, provides that an adjudicatory agency such as the Commission must give all interested parties in a case of this nature a fair and reasonable opportunity—

1) to submit all relevant facts and arguments; and

2) to attend a hearing at which both oral and documentary evidence may be received.

More specifically, the latter statute prescribes (at 5 U.S.C. §556(d)):

"A party is entitled to present his case . . . by oral and documentary evidence, to submit rebuttal evidence,

and to conduct such cross-examination as may be required *for a full and true disclosure of the facts.*"

Since we honestly believe that all of the Commission's procedures since November 7, 1972 have thus plainly been violative of the last mentioned statutes and that its denial of the essential procedural rights hereinabove specified is likewise a denial of administrative due process of law, we urge the Commission to reject or withdraw all of the "findings" and "conclusions" asserted in its unsupportable draft statement of March 13, 1973. Patently, those "findings" and "conclusions", devoid as they are of any sustainable evidence or record to support them, cannot constitute a valid basis for any subsequent order in this case which purports to establish the lawfulness of the rates challenged by the Commission's order of November 7, 1972.

Of course, it is still not too late for the Commission to schedule a full and fair evidentiary hearing at this time; to solicit all of the available oral and documentary evidence dealing with the issues here involved; and to permit such cross-examination as will lead to "full and true disclosure of the facts". NASMI thus urges the Commission to follow that course, on an emergency basis if necessary at this juncture of the proceedings, and to determine fairly and reasonably, not arbitrarily, whether the challenged rates are lawful or unlawful; or whether they should be rejected because of the adverse environmental impact they necessarily will have upon our nation's urgent efforts to stimulate and expand recycling through the elimination of federally-sponsored discriminatory freight rates that stifle recycling while they simultaneously encourage the unnecessary depletion of some of our most precious natural resources.

II.

The Draft Environmental Statement Actually Seems Antagonistic To The Sense And Spirit Of The National Environmental Policy Act And Thus It Continues To Be Based Exclusively On The Same Old Arbitrary Positions The Railroads Have Advanced And The Commission Has Adopted Since 1698 To License A Long Series Of Rate Increases For Recyclable Commodities.

Since 1968, the railroads have sought five successive across-the-board rate increases for recyclable commodities. The Commission has licensed four of these, and is threatening to license the fifth in this proceeding (See *Ex Parte 259, Increased Freight Rates, 1968; Ex Parte 262, Increased Freight Rates, 1969; Ex Parte 263, Increased Freight Rates, 1970; Ex Parte 267, Increased Freight Rates, 1971; Ex Parte 281, Increased Freight Rates, 1972*). In each instance, the Commission has simply adopted the railroads' monotonous contention that "they have a critical need for additional revenue", and that such increases should be licensed by the Federal Government irrespective of any adverse effect they may have upon recycling, resource recovery, conservation of precious natural resources, and the mounting national solid waste crisis.

In *S.C.R.A.P. v. United States and Interstate Commerce Commission*, 340 F. Supp. 189 (1972), the United States District Court for the District of Columbia enjoined the Commission's first attempt to license the fifth successive rate increase in five years for recyclable commodities on the ground that the Commission *"failed to give adequate consideration to the environmental amenities"* involved.[2] The Commission states, at page 4 of its instant Draft Environmental Impact Statement, that we (the Commission) thereupon immediately "recognized that we would need more evidence to enable us to assess the potential environmental impact of the selective increases". As stated above, however, the Commission has inexplicably forestalled the presentation of the necessary evidence, and hence it is not at all surprising that its present Draft Environmental Statement prepared already "in the dark" insofar as the true facts and circumstances are concerned, is nothing but a mere re-play of the same old reasons the Commission has given in the past for licensing rate increase after rate increase for recyclable commodities.

Thus, NASMI respectfully submits that the Commission's latest effort in this area still completely fails *"to give adequate consideration to the environmental amenities"* involved in these constant rate increases, and indeed the present Draft Statement actually seems to be more an-

[2] See Draft Environmental Statement, at page 4, where the Commission itself states the injunction was granted because "we . . . failed to give adequate consideration to the environmental amenities".

tagonistic and negative toward those "environmental amenities", and to the sense and spirit of the National Environmental Policy Act itself, than even some of the Commission's earlier pronouncements in this area (See, for example, Ex Parte MC-85, *Transportation of Waste Products For Reuse and Recycling*, 114 MCC 92, 93 (1971)).

It is not enough, of course, for the Commission to substitute mere quantity for quality—i.e., a 191 page Draft Environmental Impact Statement is not necessarily better than no statement at all, and a 30-page bibliography is meaningless if, in the final analysis, that bibliography is almost completely ignored in the body of the Draft Environmental Impact Statement itself. Thus, while NASMI agrees with the Commission that "NEPA is not a one-dimensional statute",[3] NASMI respectfully submits that the Commission's present Draft Statement under NEPA is nevertheless plainly a "one-dimensional document". In fact, insofar as the true environmental issues involved in this proceeding are concerned, the Statement seems to be totally blind.

First of all, the Commission's Draft Statement seems to want to avoid the basic fact that, when Congress passed NEPA in 1969, it did so for the express purpose of *enhancing the quality of recyclable materials and to approach maximum attainable recycling of depletable natural resources* (See 42 U.S.C. §4331(b)(6)). Thus, Congress directed (42 U.S.C. §4331(b)):

> "... (I)t is the continuing responsibility of the Federal Government to use *all practicable means*, consistent with other essential considerations of national policy ... to the end that the Nation may—
>
> (6) *enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.*"

In an effort to guarantee that this national recycling policy would be effectively accomplished on a continuing basis by all Federal agencies and the courts as well, Congress went on to prescribe in NEPA:

(1) that "the policies, regulations and public laws of the United States shall be interpreted and adminis-

[3] See Commission's Draft Statement, pg. 7.

tered in accordance with the policies set forth in this Act" (42 U.S.C. §4332(1));

(2) that "All agencies of the Federal Government shall review their present statutory authority, administrative regulations and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act, and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes and procedures set forth in this Act" (42 U.S.C. §4333);

(3) that "all agencies of the Federal Government" shall henceforth support all "major Federal actions" dealing with environmental matters such as those involving recycling and depletion of natural resources with a so-called NEPA environmental impact statement (42 U.S.C. 4332(2)); and

(4) that "The policies and goals set forth [in NEPA] are *supplementary* to those set forth in existing authorizations of Federal agencies" (42 U.S.C. §4335).

Here, however, four years after the enactment of NEPA, we still find the Interstate Commerce Commission doggedly contending that when the national interests involved in enhanced recycling and conservation of depletable resources clash in any respect with those of the railroad industry, those of the railroad industry must prevail.[4] In the eyes of the Commission, "an economical and efficient transportation system" must always take precedence. More specifically, the Commission's Draft Statement asserts erroneously and contrary to NEPA, NASMI submits—[5]

> "We believe that any environmental costs which may be expended as a result of our action in this proceeding are outweighed by the economic benefits derived by the railroads...."

Secondly, the Commission's Draft Statement, absolutely

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[4] See Draft Statement, pg. 119-191.

[5] See Draft Statement, pg. 191.

and narrowly committed to the "best interests of the railroads" irrespective of any adverse environmental results which might result, also completely ignores the fact that all other federal agencies created by or involved in the administration of NEPA have unanimously determined that the existing system of railroad freight rates grossly discriminates against recyclable or recycled commodities and in favor of competing, depletable natural resources. Strangely, the Commission's Draft Statement is totally silent regarding this fact, albeit it must know or should know:

1) that repeatedly, the President's Council on Environmental Quality created by Congress in NEPA (42 U.S.C. §4342-44), has advised the Commission in writing:

"Solid waste disposal is one important aspect of the total pollution problem and recycling is a . . . desirable alternative to solid waste disposal which the Council strongly supports. The degree to which this technique will be used depends almost entirely on economics. Transportation costs, to the degree they increase secondary or scrap material costs compared to the raw materials with which they compete, act as a disincentive to recycling. *The Council believes that several rail haul cost biases currently exist and would like to discuss these cases with you. . . . In general, across-the-board percentage increases only widen existing price biases against secondary materials. Also, these increases raise the cost of doing business which can hinder the salvage and reclamation industry.*

"In light of the President's concern with environmental quality, the growing problems of solid waste and the importance of recycling to alleviate them, I would like to express the Council's hope that the Interstate Commerce Commission's actions on the key issue of scrap material transportation rates will be consistent with the Nation's environmental quality goals."

2) that the President's Citizen's Advisory Committee on Environmental Quality, also created by Congress

under NEPA (42 U.S.C. §4345) is on record as stating in its 1972 Report to President Nixon, at page 40:

> "Traditionally, freight rates established by the Interstate Commerce Commission (ICC) for the most part discourage recycling. For example, it costs almost $1.50 per gross ton more on the average to ship ferrous scrap than newly-mined ore for domestic use. Similar situations exist for other secondary materials, and they work against recovery of solid waste....
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> "In general, ICC freight rates continue to discourage use of secondary materials, but it is encouraging to learn that the ICC, at the urging of the Council on Environmental Quality, has recently stated its intention in setting freight rates to comply with environmental impact statement requirements of NEPA. *In our 1971 Report, the Committee recommended that the ICC initiate comprehensive remedial action as soon as possible. We urge prompt further action.*"

3) that the National Industrial Pollution Control Council, created by the President pursuant to NEPA (See *Executive Order 11523*) stated, in its July, 1972 Report on "Paper and Wood Packaging In Solid Waste", at page 10, 11:

> "The relatively high freight rates usually place waste paper . . . at a price disadvantage as compared to . . . pulp. . . . Recommendations for increasing U.S. exports of waste paper invariably list the reduction in freight costs as the most important problem to be solved.

4) that the National Materials Policy Board of the National Academy of Sciences and Engineering stated in its Report NMAB-294, issued in August, 1972, at page 32:

> "Secondary materials recovery should be on at least as favorable a footing as primary materials production with regard to . . . freight regulation."

Moreover, while the Commission continues to focus its attention exclusively on the "railroad interests" involved in this proceeding, Congress itself has been taking the

following actions regarding rail rates and increases in rail rates which discriminate against recyclable materials in favor of the railroads and competing virgin raw materials:

(i) On August 4, 1972, the Senate unanimously adopted an amendment to S. 1729, 92d Congress, 1st Session (the Fast Freight Systems Transportation Act of 1971) which proposed to give the Interstate Commerce Commission only 2 years fully to investigate and cancel all discriminatory and unreasonable rates charged by railroads and trucking concerns for the transportation of recycled commodities;

(ii) Later in the same session the Senate Commerce Committee favorably reported another bill, the Surface Transportation Act of 1972, which contained a similar provision aimed at the elimination of freight rates which discriminate against recyclables and actually require recyclables to subsidize competing virgin commodities;

(iii) Concomitantly, the Surface Transportation Subcommittee of the House of Representatives unanimously reported the so-called Surface Transportation Act of 1972, which likewise contained a Section 406 entitled "Establishment of Non-Discriminatory Rates For The Transportation of Recycled Solid Waste Materials", pursuant to which Congress once again proposes to direct the Interstate Commerce Commission to terminate within two years all discriminatory railroad freight rates charged for the transportation of recycled commodities.

(iv) And, of course, heretofore, in 1970, Congress passed the Resource Recovery Act (42 U.S.C. §§3251 et seq.), wherein Congress pointedly directed all Federal agencies to take whatever actions were necessary promptly to stimulate recycling of our depletable natural resources and to eliminate all Federal programs and policies, including discriminatory transportation rates regulated by the Federal agency, which tend to frustrate and defeat recycling.

These Congressional directives, of course, are contained in bills which provide literally billions of dollars of additional federal subsidies for the railroads. Obviously, therefore, Congress has concluded that, if the Federal Govern-

ment is constantly to be called upon to grant more and more largesse to the railroads, the railroads must at least be required by the Commission to cancel their grossly discriminatory rates which are so detrimental to the national environmental interests inherently involved in replacing the carniverous depletion of our depletable natural resources with a workable, enhanced system of recycling. Again, however, the Commission's Draft Statement strangely fails to take note of any of these important facts, albeit they are a matter of public information in the Congressional Record.

With its rather myopic view of the situation here involved, the Commission's Draft Statement also unfortunately overlooks a recent joint report issued by the National League of Cities and the United States Conference of Mayors as recently as March 22, 1973. That report, entitled the "Cities And The Nation's Disposal Crises", describes the basic factual problem here involved as follows:

> "The national problems of waste disposal and resource conservation are as crucial as any this nation faces in the latter third of the twentieth century. With almost half of our cities running out of current disposal capacity in from 1 to 5 years, urban America faces an immediate disposal crises. For these cities, solid waste management is conducted at the intersection of two critical trends:
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> (1) the sky-rocketing volume of solid waste and
> (2) the sharp decline of available urban land for disposal sites.
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> "The rapid increase in solid waste generation so characteristic of the nation as a whole is even more pronounced in cities. In the past 50 years, the amount of waste discarded per person in the United States has doubled. But for cities, solid waste volumes are estimated to have almost doubled in the past 20 years. The urban percentage of the total population, now 74 percent, has increased 10 percent since 1950. Between 1958 and 1976, packaging consumption (90 percent of which is disposed) will have increased an estimated 63 percent. Solid waste is growing 5 times faster than the population; and overall, cities must dispose of 20 percent more solid waste per person than other areas.

"In other words, during the lifetime of one collection vehicle, a given city's waste load has averaged an estimated increase of between 15 and 20 percent. It is not surprising, therefore, that disposal sites and disposal methods rank 1-2 as the most pressing municipal solid waste needs.

"Related to increased demands upon local waste management, is the inter-relationship between solid waste disposal and other environmental control systems. Federal policies and regulations aimed at protection of the nation's air and water have produced immense waste disposal consequences for cities. Both the increase of semi-liquid sludges and the prohibition against incineration in major cities have raised significantly the land requirements for municipal disposal.

"As a result, at least half of our cities cannot rely totally upon land disposal of wastes within their own jurisdiction; and they must consider other methods without excessive land requirements.

"Multi-jurisdictional approaches to meet the waste disposal crisis are commendable and viable; but several impediments make them difficult, sometimes impossible, to achieve. Federally established freight rates and state laws relating to transportation of solid waste across interstate lines are prime inhibitors."

The said Joint Report, now on file with the Environmental Protection Agency, goes on to state, at page 7:

"Resource recovery is attractive theoretically; but recovery and recycling are not viable because they are not economically profitable. Recycling markets are severaly limited for cities due to Federal policies which favor virgin materials use and discourage, even penalize, utilization of recycled materials. Cities interested in recycling have no market incentives working for them comparable to Federally established depletion allowances and capital gains tax credits for virgin materials.

"Cities in our survey, when asked what they would most like to see embodied in new Federal solid waste legislation, listed the enhancement of recycling and resource recovery as their number one preference. It is not the choice of cities that only one percent of

municipal wastes are recycled; it is an aggregate choice compelled by Federal policies, limited markets, and consumer preferences. Without markets for recovered resources and large scale recycling, cities are left to dispose of wastes they did not create on land they no longer have.

"Financially, cities are already bearing the national burden of increasing disposal costs. Of the total direct solid waste expenditures for Federal, State and selected large local governments in FY 71, 98 percent came from local governments. Solid waste collection and disposal costs cities an estimated $6 billion annually. It is the third largest local expenditure funded solely from local revenues. A dramatic example of local-Federal inequities is this: Our 48 largest cities are spending nearly 50 percent of their environmental budgets for solid waste management, while the Administration's proposed Federal budget for FY 74 earmarks only one percent of the Federal environmental dollar for solid waste.

"For cities, the lack of resource recovery opportunities have driven total disposal costs even higher. An estimated 16 to 24 percent of the nation's solid waste is potentially recoverable and reusable. Yet by several estimates, cities are forced to expend $6 billion annually for collection and disposal and throw away metals alone worth $5 billion.

Finally, the League of Cities-Conference of Mayors Joint Report concluded, at pages 21-24:

"If we are to confront the problems of waste generation, collection and disposal, and if we are to move forward with resource recovery and conservation, an appropriate division of responsibilities is imperative. In light of the high priority matrix presented in the previous section, the . . . respective intergovernmental roles (are) as follows . . .

A. *Federal Solid Waste Management* . . .

1. *Regulation*

c. Remove transportation barriers . . .

2. *Resource Recovery* . . .

b. Correct inequities in freight rates."

In sum and substance, therefore, it seems fair to state that the Commission's Draft Environmental Impact Statement in this case is sadly absolutely out-of-step with the position of the Congress and all other Federal agencies concerned with the problem of discriminatory transportation rates and the extremely adverse impact they have on recycling, conservation of resources and effective management of our country's growing mountains of solid waste have consistently taken.

Indeed, the Commission's Statement is diametrically in conflict with recent actions its sister transportation regulatory agency—the Federal Maritime Commission—has taken, on its own motion, in this area. In this regard, the Commission's attention is directed to the following:

(A) *Order of Investigation* issued by FMC in *Matter of Pacific Westbound Conference,* FMC Docket No. 72-35, copy of which is annexed hereto as *Exhibit D.* In that Order, FMC states on its own motion:

> "The Commission is aware of the many potential benefits to be derived from increased recycling of our national solid waste through encouragement and development of existing or new ways and means for disposing of such waste. Wastepaper, for example, competes directly with virgin woodpulp both in domestic and foreign trades. . . . However, the Commission has reason to believe that the rates charged by members of PWC for transportation of wastepaper may preclude wastepaper from being competitive with woodpulp. . . .
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> "It is questionable whether these rates have been established with proper regard to cost, value and other ratemaking factors."

(B) Draft Environmental Impact Statement issued by FMC in *PWC, supra* (*Exhibit E* hereto);

(C) Draft Environmental Impact Statement issued by FMC in *Matter of Pacific Coast Australasian Tariff Bureau,* FMC Docket No. 71-83 (*Exhibit F* hereto).

Whereas the Interstate Commerce Commission has, rather blindly we submit, concluded in this case that discriminatory freight rates do not substantially affect recycling, conservation of depletable resources, etc., FMC

has asserted continuously in the above, closely-related freight rate cases (Exhibit D-F):

> (i) "the Commission (FMC) has reason to believe that the rates charged by members of PWC for transportation (of recyclables) may preclude (recyclables) from being competitive. . . .
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> (ii) "The rates as presently filed may have significant environmental impact. . . . Exporters may be encouraged to ship woodpulp from virgin timber instead of wastepaper in situations where properly recycled wastepaper could serve the same purposes as woodpulp. This could result in a continuing depletion of our forests. If this be the case, the resultant defacing and reduction of areas of scenic beauty and limitation of the number and size of the nation's recreation areas could have serious adverse environmental effects. . . . In addition, our national policy to encourage the recycling of solid waste may be thwarted. If, as a result of this proceeding, the rates are equalized or established so that the rates on the exportation of wastepaper are lower than on woodpulp, exporters might be encouraged to ship wastepaper with concomitant benefits to the recycling process and solid waste disposal. This might tend to lessen the use of virgin timber woodpulp, thereby lessening the depletion of our forests and consequently enhance the overall environment."

Obviously, therefore, the ICC's conclusions in its pending Draft Environmental Statement in this case are categorically at odds with those FMC is reaching in these related cases dealing with the same problem—the effect discriminatory freight rates and constant increases in those rates have upon the environment. Clearly, the broad environmental stakes and costs involved are too serious and too deadly with arbitrarily or capriciously or in a manner calculated simply to satisfy the insatiable revenue appetite of the railroad industry. NASMI thus urges the Interstate Commerce Commission carefully to reconsider the baseless positions it has taken so far in its Draft Statement in this case, and upon such reconsideration—

> (1) to demand that all interested parties government and private alike, make all of the true facts and

circumstances here involved available to the Commission in the course of a public hearing to be scheduled without further delay;

(2) to bring the Commission's overall viewpoint into line with the letter, spirit and intent of NEPA, the Resource Recovery Act of 1970, and the positions hereinabove referred to of all other interested Government agencies, including the Federal Maritime Commission;

(3) to re-issue, in final form, an environmental impact statement which will declare, in justice, that, in 1973 and in the light of all existing Federal policies in this area, recyclables can no longer be compelled, through higher discriminatory freight rates, to subsidize both the railroads and their competing virgin commodities.

In this regard, of course, the Commission's action would be fully consistent with the concurring opinion expressed by ICC Commissioner Brown in this case (341 I.C.C. 530):

"While I am in general agreement with the majority as to the increases authorized in the report, I am of the opinion that we should not approve any of the increases requested for recyclable commodities. In reaching this conclusion, I have balanced the revenue needs of the rail carriers against the effect of such increases on the quality of the human environment. On the one hand, and with due consideration of the rail contentions respecting need for additional revenues, it is my considered opinion that denying the rail request for increases on recyclable commodities will, on the whole, have very little effect on overall rail revenues. On the other hand, the National Environmental Policy Act of 1969 (NEPA) was enacted into law by the Congress in order to meet a long-overdue need and strong public pressure for affirmative national action to improve the quality of our deteriorating environment. Further, it is evident that both the Executive and Judicial branches of our Government are vitally concerned with environmental problems. Thus, the administrative agencies charged with regulatory responsibilities cannot in good conscience ignore this clear mandate for action. . . . In my view, no better way can be

found to deal with this issue than to deny increases on these commodities and thus remove any possible risk that further increased transportation charges may retard the movement and free flow of these articles in interstate commerce."

Such action would also be wholly consistent with Commissioner Deason's opinion herein, which stated (341 I.C.C. 531):

> "As a matter of policy, I dissent to that portion of the report which grants increases on selected recyclable materials. It is my view that, all things considered, the Commission should grant no further increases on recyclable materials at this time."

III.

Having Failed To Conduct Any Hearing Regarding The Issues Raised By The Commission's Order Of November 8, 1972 And Having Failed To Obtain Evidence From The Interested Parties, There Is No Sustainable Evidence On Record To Support The Draft Statement's Bald Assertions That The Existing Freight Rate Structure Does Not Discriminate Against Recyclables And That The Proposed Fifth Increase In Rates In Five Years Will Not Adversely Affect The Movement Of Recyclables. Indeed, All Of The Evidence of Record In The Earlier Proceedings In This Case Is To The Contrary.

In its Report issued on October 4, 1972, the Commission candidly conceded that, without a full hearing and an "in-depth investigation", it is absolutely impossible for the Commission to decide fairly and justly whether "the sought rate increases, if approved, would merely aggravate basic long standing discriminations against secondary materials . . . embedded in the present rate structure" (See 341 I.C.C. 327).

Now, however, mysteriously and magically the Commission, *without holding any hearing since October 4, 1972 and patently without making any "in-depth investigation"*, has suddenly found it possible to rule, in its Draft Statement of March 13, 1973, that there really is no discrimination against recyclables in the basic rate structures and

that further increases in those rates will not adversely affect recycling or aggravate any existing discrimination.

Plainly, these conclusions are wholy unsupported by the record in this case. Indeed, the record here is to the contrary. In this regard, *the Commission itself ruled in its Report of October 4, 1972,* on the basis of the record before it (341 I.C.C. 369):

> ". . . the low value of these articles, the relatively high percentage of freight charges to sales price, and their generally favorable transportation characteristics, . . . warrant . . . limitation upon the proposed increases."

At best, therefore, we are now faced with the ugly picture of a Federal agency, ordered by a Federal court to comply with Federal law, allegedly attempting to do so in a manner which even conflicts diametrically with its own prior holdings in the same case. Why should the Commission want to proceed in that manner? Why should it endeavor to write a 191 page Draft Statement without holding any hearing and without even soliciting factual in-put from all interested parties? Why should the Commission constantly refuse to comply with or attempt to circumvent the sense and spirit of Federal environmental statutes in this manner?

If the answer is that the Commission does not want to or cannot make an "in-depth" study of the true facts here involved until it reaches this entire problem again in *Ex Parte 270, Investigation of Railroad Freight Rate Structure* as the Commission has repeatedly stated. (See 341 I.C.C. 327; *Draft Statement,* pgs. 14, 15), then isn't it only fair that the proposed increases in this case should be denied for the present, i.e., until the Commission is able to complete its Ex Parte 270 investigation?

One thing is certain: It is totally unfair for the Commission to proceed, as it proposes to do in its Draft Statement, when to do so threatens to do further irreparable damage to several different segments of our national environment.

IV.

The Railroad's Revenue Needs Do Not Afford A Valid Excuse For The Commission's Proposed Fifth Successive Rate Increase Action.

Commissioners Brown and Deason were, of course, correct in their holdings herein to the effect that "denying the rail request for increases on recyclable commodities will . . . have very little effect on overall rail revenues". (341 I.C.C. 530). But, there is another side to this "revenue coin". The railroads are presently urging the Congress to grant them billions of dollars of Federal subsidies and to let them operate with less and less Federal regulatory control. Certainly, the railroads want that Congressional relief far more than they want the relatively meager revenue increases these higher rates on recyclables would produce. Then, in order to qualify for the Congressional relief, has not the time arrived when the ICC should require the railroads themselves to act in the national interest by foregoing, for the present at least, any further rate increases on recyclables until the Commission can fairly study the basic rate discrimination involved in Ex Parte 270? Should not the railroads for a change in this instance at least be requested by the Government (ICC) to follow the plea of the late President Kennedy, who said: "Ask not what your country can do for you—ask what you can do for your country."

For decades, recyclable commodities have been forced to pay higher and higher discriminatory freight rates, and by so doing, to subsidize both the railroads and their competing commodities, favored with lower base rates. In justice, should not the Commission finally follow the lead of FMC and rule that the time for a change has clearly arrived—the burden on recyclables must be lightened and they must be permitted to compete fairly with their virgin counterparts in the marketplace. NEPA requires nothing less than this at this stage of our history, where natural resources are dangerously scarce while we are simultaneously in danger of being buried in our own mountains of solid waste.

Respectfully submitted:

National Association of Secondary Material Industries, Inc.

By Edward L. Merrigan
EDWARD L. MERRIGAN
Counsel

February 5, 1973

Honorable Robert L. Oswald,
Secretary
Interstate Commerce Commission
Twelfth Street and Constitution Avenue, N.W.
Washington, D. C.

Re: Ex Parte No. 281 Environmental Considerations Order of November 8, 1972

Dear Mr. Secretary:

On November 8, 1972, the Commission issued an order in the above proceeding, the basic purpose of which was to permit the Commission to investigate "the environmental effects of increased railroad freight rates and charges on the movements of commodities being transported for . . . recycling." Said order stated "an investigation (would) be instituted . . . with a view to making such findings and orders as the facts and circumstances shall warrant."

As counsel for petitioner National Association of Secondary Material Industries, Inc. (NASMI), we have been asked by our client to inquire:

1. Has the said investigation referred to in the Commission's order of November 8, 1972 actually commenced?

2. If so, when will a hearing or conference be held at which interested parties such as NASMI will have an opportunity to present facts and evidence relevant to the subject matter of said investigation?

3. If no hearing is to be held, how and when may interested parties such as NASMI present facts and evidence relevant to said investigation for the Commission's consideration?

Your prompt advice will be appreciated, especially since 3 full months have already passed since the date of the Commission's order and NASMI has received no notice of any kind as to how and when interested parties may effectively participate in the Commission's announced investigation.

Sincerely,

Counsel,
National Association of Secondary Material Industries, Inc.

ELM/bas
bcc: Mr. M. J. Mighdoll
Mr. John C. Vaccaro

ORDER

SERVICE DATE
NOVEMBER 8, 1972

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 7th day of November, 1972.

Ex Parte No. 281

INCREASED FREIGHT RATES AND CHARGES, 1972
(Environmental Considerations)

Upon consideration of the record in the above-entitled proceeding, and of the report and order of the Commission reported at 341 I.C.C. 288, and of:

(1) Petition of the Institute of Scrap Iron & Steel, Inc., filed October 25, 1972, for reconsideration of the environmental impact of increased railroad rates and charges on the movement of scrap iron and steel;
(2) Petition (letter) of *Students Challenging Regulatory Agency Procedures* (S.C.R.A.P.), filed October 25, 1972, for reconsideration of the environmental issues as to commodities being transported for the purpose of recycling;
(3) Petition of the National Association of Secondary Materials Industries, Inc., filed October 27, 1972, for reconsideration of the environmental issues as to movements of wastepaper, textiles, and non-ferrous metals for the purposes of recycling;
(4) Petition of Northwestern Steel and Wire Company filed October 27, 1972, for reconsideration of the environmental issues as to movements of scrap iron;
(5) Petition (letter) of the Council on Environmental Quality, filed October 31, 1972, for reconsideration of the environmental issues as to recycling generally;
(6) Petition (letter) of Environmental Protection Agency filed October 13, 1972, for reconsideration of the environmental issues as to movements of secondary materials, scrap steel, and returnable containers;

(7) Supplementary petition of National Association of Secondary Material Industries, Inc., filed October 31, 1972, embracing copies of the letter-petitions in (2), (5), and (6) above;

(8) Petition of Copperweld Steel Company, filed November 1, 1972, for reconsideration of the environmental issues as to movements of ferrous scrap:

(9) Petition (letter) of Environmental Defense Fund, filed November 2, 1972, for reconsideration of the environmental issues as to recyclable materials generally;

and good cause appearing therefor:

It is ordered, That the above-entitled proceeding be, and it is hereby, reopened for the limited purpose of further evaluating, in accordance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), the environmental effects of increased railroad freight rates and charges on the movements of commodities being transported for the purpose of recycling as defined in paragraph (m) to the General Exceptions to the Tariff of Increased Rates and Charges X-281-B.

It is further ordered, That the order entered in the above-entitled proceeding on September 27, 1972, be, and it is hereby, modified by deleting from the first ordering paragraph thereof the phrase "and 35 days in the case of commodities being transported for purposes of recycling."

It is further ordered, That in view of the foregoing actions, and because there is reason to believe that the tariff schedules identified in the appendix to this order may, if permitted to become effective, result in the rates and charges, rules, regulations, or practices which would not be in conformity with the report in Ex Parte No. 281, *Increased Freight Rates and Charges, 1972,* 341 I.C.C. 288, decided September 27, 1972, as modified in this order, an investigation be, and it is hereby, instituted into and concerning the rates, charges, and regulations contained in said schedules, with a view to making such findings and orders as the facts and circumstances shall warrant. In the event the said schedules are changed, amended, or reissued upon termination of the suspension period, and the investigation having not been concluded, such changed, amended, or reissued schedules will be included in this investigation.

It is further ordered, That the operation of the said schedules be, and it is hereby, suspended, and that the use thereof on interstate and foreign commerce be deferred to and including June 10, 1973, unless otherwise ordered by this Commission.

It is further ordered, That the investigation in this proceeding shall not be confined to the matters and issues hereinbefore stated as the reason for instituting this investigation, but may include all matters and issues with respect to the lawfulness of the said schedules under the Interstate Commerce Act.

It is further ordred, That neither the schedules hereby suspended nor those sought to be altered thereby shall be changed until this proceeding has been disposed of or until the period of suspension has expired, unless otherwise ordered by the Commission.

It is further ordered, That a copy of this order be filed with the schedules in the office of the Interstate Commerce Commission, and that copies hereof be served upon the carriers parties to the said schedules, and that the said carriers be, and they are hereby, made respondents to this proceeding.

It is further ordered, That with respect to commodities whose new rates and charges are suspended by this order, the expiration dates of the Tariff of Emergency Charges, X-281, issued jointly by Western Trunk Line Committee, Agent, I.C.C. No. A-4825 and other designated agents, as amended, be, and they are hereby, extended to and including June 9, 1973, subject to the preliminary injunction issued on July 10, 1972, by the United States District Court for the District of Columbia in Civil Action No. 971-72, *S.C.R.A.P.* v. *United States, et al.*

And it is further ordered, That except to the extent set forth above, the said petitions be, and they are hereby, denied.

ROBERT. L. OSWALD

(SEAL)

Secretary

APPENDIX

Tariff Schedules Ordered Suspended and Ivestigated

Tariff schedules filed with the Interstate Commerce Commission setting forth new provisions and new rules, regulations, and practices affecting rates and charges, applicable on interstate or foreign commerce, to become effective November 11, 1972, and later, designated as follows:

Tariff of Increased Rates and Charges, X-281-B, issued jointly by Traffic Executive Association-Eastern Railroads, Agent, its I.C.C. No. C-939, and other designated agents:

On page 32, ITEM 499;
On page 14, the expiration date of November 11, 1972;

Supplement 1;
In SUPPLEMENT 2, on page 2,
the expiration date of November 11, 1972.

INTERSTATE COMMERCE COMMISSION
Washington, D.C. 20423

Office of Proceedings February 9, 1973

Mr. Edward L. Merrigan
Smathers and Merrigan
888 Seventeenth Street, NW
Washington, D.C. 20006

Dear Mr. Merrigan:

This replies to your letter of February 5, 1973, on behalf of your client, the National Association of Secondary Material Industries, Inc. (NASMI), concerning the status of Ex Parte No. 281, *Increased Freight Rates and Charges, 1972* (*Environmental Matters*).

By notice to the parties in the above-mentioned proceeding dated December 4, 1972, NASMI was informed that this Commission had made a preliminary in-depth study of the environmental issues involved. Appended to this notice was a compilation of the available material (which is in addition to that already of record in this proceeding) that this Commission may utilize in the preparation of a draft environmental impact statement in this matter. The notice, which was served upon John C. Vaccaro and Ed. L. Mury of NASMI, at 330 Madison Avnue, New York, N. Y. 10017, requested all parties that filed petitions for reconsideration on the environmental issues in this proceeding and the railroad respondents to refer this Commission to any additional literature or materials not listed in the bibliography which would be of assistance to our present efforts on or before December 22, 1972. NASMI did not respond to this notice, but many other participants have submitted additional data. All of these data are being analyzed at the present and it is this Commission's hope that a draft environmental impact statement will be forthcoming in the near future. As the notice to the parties explains, further opportunity for submitting comments will be afforded subsequent to the issuance of such a draft impact state-

ment. No further oral hearings or conferences are contemplated at this time.

For your information, I am enclosing a copy of the above-described notice. I trust the foregoing will be of assistance.

Sincerely,

/s/ Sheldon Silverman
SHELDON SILVERMAN
Director

EXHIBIT B

Enclosure

NATIONAL ASSOCIATION OF SECONDARY MATERIAL INDUSTRIES, INC.

330 Madison Avenue
New York, N.Y. 10017
(Area code 212) TN 7-7330

December 19, 1972

Mr. Robert L. Oswald
Secretary
Interstate Commerce Commission
Constitution Avenue at 12 Street N.W.
Washington, D.C. 20034

Re: Ex Parte 281, Increased Freight Rates and Charges, 1972 (Environmental Matters)

Dear Mr. Oswald:

Pursuant to the Commission's notice served December 8th enclosed additional literature and material not listed in the bibliography.

1. National Priorities For Recycling, NASMI
2. Recycling, NASMI
3. A Guide To Effective Solid Waste Utilization, NASMI
4. Recycling As An Industry, Howard Ness, Technical Director, NASMI
5. The Effects Of Recycing Of Solid Waste On Future Raw Material Demands, Howard Ness, Technical Director, NASMI

Below literature containing additional facts and data which we feel must be studied by the Commission in furtherance of their efforts for a comprehensive understanding of the environmental issue.

1. Economics of Recycling Waste Materials. Hearing Before the Subcommittee on Fiscal Policy on the Joint Economic Committee Congress of the United States, Ninety-

Second Congress, First Session, November 8 and 9, 1971. Available at U.S. Government Printing Office, Washington, D.C.

2. A Study to Identify Opportunities for Increased Solid Waste Utilization. Three volumes, prepared by Battelle Columbus Laboratories. Available at National Technical Information Service, U.S. Department of Commerce, 5825 Port Royal Road, Springfield, Virginia 22151.

The Commission can be assured of our wholehearted cooperation in any way we can be helpful relative to your research activity, and in this connection feel free to call upon our recycling experts if the need should arise.

Very truly yours,

JCV:go

John C. Vaccaro
Transportation Director

EXHIBIT C

FEDERAL MARITIME COMMISSION

DOCKET No. 72-35

PACIFIC WESTBOUND CONFERENCE—INVESTIGATION OF RATES, RULES AND PRACTICES PERTAINING TO THE MOVEMENT OF WASTEPAPER AND WOODPULP FROM UNITED STATES WEST COAST PORTS TO PORTS IN JAPAN

ORDER OF INVESTIGATION

The Pacific Westbound Conference (PWC), consisting of twenty-two (22) participating carriers and four (4) associate members, operates under Commission-approved Agreement No. 57 in the trade from United States Pacific Coast ports to ports in the Far East including ports in Japan, Korea, Taiwan, China, Hong Kong, Philippine Islands, Thailand, Cambodia, and Viet Nam.

The Commission is aware of the many potential benefits to be derived from increased recycling of our national solid waste through encouragement and development of existing or new ways and means for disposing of such waste. Wastepaper, for example, competes directly with virgin woodpulp both in the domestic and foreign trades and appears to be readily available for export from the United States at prices far lower than those charged for their virgin counterparts. However, the Commission has reason to believe that the rates charged by members of the PWC for transportation of wastepaper may preclude wastepaper from being competitive with virgin woodpulp.

EXHIBIT D

Rates on woodpulp are "open" allowing each Conference member to set rates at a level consistent with and based upon their individual operating expenses, while rates on wastepaper are fixed under the dual rate system. This permits exporters of woodpulp whose rates are "open" to utilize the services of carriers having the lowest rates at the time of shipment, while exporters of wastepaper must exclusively use the Conference carriers at contract rates or refrain from signing the contract in order to use non-conference carriers.

Moreover, the Commission has reason to believe that although the PWC publishes no container load rates applicable to woodpulp or wastepaper, a significant portion of the movement of wastepaper may be in containers. Furthermore, rates on both woodpulp and wastepaper are on a weight basis related to the density of the specific shipment, which rates may have no relation to the comparative cost of transporting a loaded container of the lower valued wastepaper and a fully loaded container of woodpulp. The rate on wastepaper is $31.25 or $37.00 per long ton depending on density while the rate on woodpulp is between $14.50 and $32.00 per short ton, depending on the Conference carrier used. It is, therefore, questionable whether these rates have been established with proper regard to cost, value and other ratemaking factors.

NOW THEREFORE, IT IS ORDERED, Pursuant to Sections 22, 15, 16, 17 and 18(b)(5) of the Shipping Act, 1916, that an investigation be instituted to determine whether the provisions of the Pacific Westbound Conference tariffs, and/or actions of its member lines pursuant thereto, related to the movement of wastepaper and woodpulp from United States West Coast ports to ports in Japan: (1) Constitute unjust discrimination or unfair discrimination or unfair treatment as between carriers, shippers, or exporters or otherwise operate to the detriment of the commerce of the United States or are contrary to the public interest in violation of Section 15 of the Act. (2) Make or give an undue or unreasonable advantage to any particular person, locality or description of traffic in any respect whatsoever, or subject any particular person, locality or description of traffic to any undue prejudice or disadvantage in any respect whatsoever in violation of Section 16, First. (3) Result in charging or collecting rates or changes which are unjustly dis-

criminatory between shippers contrary to Section 17. (4) Result in rates or charges so unreasonably high or low as to be deterimental to the commerce of the United States contrary to Section 18(b)(5).

IT IS FURTHER ORDERED, That in the event the rates, practices, rules or regulations of the Pacific Westbound Conference or actions of its member lines pursuant thereto as they relate to the aforesaid shipments are found to violate the provisions of the Shipping Act, 1916, the investigation shall determine what action would best ameliorate the condition.

IT IS FURTHER ORDERED, That the Pacific Westbound Conference and its member lines, as set forth in Appendix "A" hereto, be named as respondents in this proceeding;

IT IS FURTHER ORDERED, That this proceeding be assigned for public hearing before an Examiner of the Commission's Office of Hearing Examiners and that the hearing be held at a date and a place to be determined and announced by the Presiding Examiner;

IT IS FURTHER ORDERED, That: (I) a copy of this Order shall forthwith be served on the respondents herein; (II) the said respondents be duly notified of the time and place of the hearing; and (III) this Order be published in the *Federal Register* and notice of hearing be served upon respondents;

IT IS FURTHER ORDERED, That all persons (including individuals, corporations, associations, firms, partnerships, and public bodies) having an interest in this proceeding and desiring to intervene therein, should notify the Secretary of the Commission promptly and file petitions for leave to intervene in accordance with Rule 5(1) of the Commission's Rules of Practice and Procedure [46 CFR Section 502.72]; and

IT IS FURTHER ORDERED, That all future notices issued by or on behalf of the Commission in this proceeding, including notice of time and place of hearing or prehearing conference, shall be mailed directly to all parties of record.

By the Commission.

/s/ Francis C. Hurney
FRANCIS C. HURNEY
Secretary

(SEAL)

APPENDIX

Pacific Westcoast Conference

Mr. D. D. Day, Jr., Chairman
635 Sacramento Street
San Francisco, California 94111

Member Lines

AMERICAN MAIL LINE, LTD.
1010 Washington Building
Seattle, Washington 98101

AMERICAN PRESIDENT LINES, LTD.
601 California Street
San Francisco, California 94108

BARBER LINES, A/S
P.O. Box 1330
Viko, Oslo, 1, Norway

JAPAN LINE, LTD.
Kokusai Building 12, 3
Marunouchi, Chiyoda-Ku
Tokyo, Japan
"Japan Line"

KAWASAKI KISEN KAISHA, LTD.
8 Kaigan-dori
Ikuta-Ku
Kobe, Japan

KNUTSEN LINE—

Dampskibsaktieselskapet Jeanette Skinner
Skibsaktieselskapet Pacific
Skibsaktieselskapet Marie Bakke
Dampskibsaktieselskapet Golden Gate
Dampskibsaktieselskapet Lisbeth
Skibsaktieselskapet Ogeka
Hvalfangstaktieselskapet Suderoy

Knut Knutsen, O.A.S.
Haugesund, Norway

A.P. MOLLER—MAERSK LINE
A JOINT SERVICE OF:
DAMPSKIBSSELSKABET AF 1912 AKTIESELSKABET
DAMPSKIBSSELSKABET SVEN

Managed by: A. P. Moller
8 Kongens Nytorv
Copenhagen K,
Denmark

MARITIME COMPANY OF THE PHILIPPINES
205 Juan Luna
Manila, Philippines

MITSUI O.S.K. LINES, LTD.
36 Hitotsugi-oho, Akasaka, Minato-ku
P.O. Box 6, Akasaka
Tokyo, Japan
"Mitsui O.S.K. Lines"

NIPPON YUSEN KAISHA
20, 2-Chome, Marunouchi
Chiyoda-Ku
Tokyo, Japan
"N.Y.K. Line"

PACIFIC FAR EAST LINE, INC.
141 Battery Street
San Francisco, California 94111

(I) PHOENIX CONTAINER LINERS LTD.
Alexandra House
Hongkong

Member Lines

SEA-LAND SERVICE, INC.
P. O. Box 1050
Elizabeth, New Jersey 07207

SEATRAIN INTERNATIONAL, S.A.
1395 Middle Harbor Road
Oakland, California 94607

SHOWA SHIPPING CO., LTD.
(Showa Ksiun Kaisha, Ltd.)
Ida Biulding, No. 1 Yaesu 2-Chome
Chuo-ku, Tokyo, Japan
"Showa Line"

STATES STEAMSHIP COMPANY
320 California Street
San Francisco, California 94104
"States Line"

SCINDIA STEAM NAVIGATION CO,. LTD., THE
Scindia House
Ballard Estate
Bombay, 1 B.R., India

TRANSPORTACION MARITIMA MEXICANA, S.A.
Av. De Los Insurgentes Sur No. 432
Tercer Piso
Mexico 7, D.F.

UNITED PHILIPPINE LINES
United Philippines Building
Santa Claro, Intramuros,
Manila, R.P.

UNITED STATES LINES, INC.
One Broadway
New York, New York 10004

YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.
6th Floor Palaceside Building
No. 1, Takahira-Cho, Chiyoda-Ku
Tokyo, Japan
"Yamashita-Shinnihon Line"

ZIM ISRAEL NAVIGATION CO., LTD.
(Zim Container Service Division)
(Zim American Israeli Shipping Co., Inc., General Agents)
7/9 Ha 'atzmaut Road
Haifa, Israel

Associate Members

PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY
Beaufort House
2 Gravel Lane, E. 1
London, England
"P & O ORIENT LINES"

SHIPPING CORPORATION OF INDIA, LTD.
Steelcrote House
Dinshaw Wacha Road
Bombay 1, India

STATES MARINE LINES
States Marine International Inc.
Global Bulk Transport Incorporated
Isthmian Lines, Inc.
(As one member only)
90 Broad Street
New York, New York 10004

(C)(C) WATERMAN STEAMSHIP CO., LTD.
140 Broadway
New York, New York 10005

FEDERAL MARITIME COMMISSION

DOCKET NO. 72-35

PACIFIC WESTBOUND CONFERENCE—INVESTIGATION OF RATES, RULES AND PRACTICES PERTAINING TO THE MOVEMENT OF WASTEPAPER AND WOODPULP FROM UNITED STATES WEST COAST PORTS TO PORTS IN JAPAN

DRAFT ENVIRONMENTAL IMPACT STATEMENT

Pursuant to section 102 of the National Environmental Policy Act of 1969, 42 U.S.C. 4331 (1972) (hereinafter NEPA) and the Council on Environmental Quality's Guidelines (36 F.R. 7724 (1971)), requiring the preparation of a detailed environmental impact statement whenever an agency of the Federal Government undertakes major federal action significantly affecting the quality of the human environment, the Federal Maritime Commission has prepared this draft environmental impact statement concerning rates presently being charged for the movement of wastepaper and woodpulp under tariffs filed by the Pacific Westbound Conference (PWC).

1. *The Nature of the Proceeding Before the Commission.*

PWC's present rate schedule provides for "open" rates on woodpulp, allowing conference members to set rates at a level consistent with and based on their individual operating expenses. This allows exporters of woodpulp to use the carriers having the lowest rates at time of shipment. The rates on woodpulp vary between $14.50 and $32.00 per short ton depending on the conference carrier used. The rates on wastepaper are fixed under the "dual rate" sys-

tem.* The rate on wastepaper varies from $31.25 to $37.00 per long ton, depending upon the density.

The Commission has reason to believe that although PWC publishes no container load rates applicable to woodpulp or wastepaper, a significant portion of the movement of wastepaper may be in containers. Furthermore, rates on both woodpulp and wastepaper are on a weight basis related to the density of the specific shipments, which rates may have in relation to the comparative cost of transporting a loaded container of the lower value wastepaper and a loaded container of woodpulp. It, therefore, appears that these rates may have been established without proper regard to cost value and other ratemaking factors.

By Commission order served July 20, 1972, pursuant to sections 22 (46 U.S.C. 821), 15 (46 U.S.C. 814), 16 (46 U.S.C. 815), 17 (46 U.S.C. 816), and 18(b)(5) (46 U.S.C. 817 (b)(5)) of the Shipping Act, 1916, the Commission has ordered an investigation to determine whether the provisions of the PWC tariffs, and/or actions of its member lines pursuant thereto, related to the movement of wastepaper and woodpulp: (1) constitute unjust discrimination or unfair treatment as between carriers, shippers or exporters or othewise operate to the detriment of the commerce of the United States or are contrary to the public interest in violation of section 15 of the Act; (2) enable or give an undue or unreasonable advantage to any particular person, locality or description of traffic in any respect whatsoever, or subject any particular person, locality or description of traffic to any undue prejudice or disadvantage in any respect whatsoever in violation of section 16 First; (3) result in charging or collecting rates or charges which are unjustly discriminatory between shippers contrary to section 17; and (4) result in rates or charges so unreasonably high or low as to be detrimental to the commerce of the United States contrary to section 18(b)(5). In the event the rates, practices, rules or regulations of the PWC or actions of its member lines pursuant thereto, as they relate to aforesaid shipments, are found to violate the provisions of the Shipping Act, 1916, the investigation shall determine what action would best ameliorate the condition.

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* As defined in 46 U.S.C. 813a. For a discussion of dual rate cases see *The Dual Rate Cases*, 8 F.M.C. 16 (1964).

2. *The Environmental Impact of the Present Rate Schedules.*

The rates as they presently stand may have significant environmental impact. Exporters may be encouraged to ship woodpulp from virgin timber instead of wastepaper in situations where properly recycled wastepaper could serve the same purposes as the woodpulp. This could result in a continuing decimation of forests. If this be the case, the resultant defacing and reduction of areas of scenic beauty and limitation of the number and size of the nation's recreation areas could have serious adverse environmental effects. The habitat of forest wildlife may be reduced. Commercial development may be encouraged in the affected areas with consequential environmental costs.

If, as a result of this proceeding, the rates are equalized or established so that the rates on the exportation of wastepaper are lower than on woodpulp, exporters might be encouraged to ship wastepaper with concomitant benefits to the recycling process. This might tend to lessen the use of virgin timber woodpulp, thereby lessening the decimation of our forests and consequently enhancing the overall environment.

3. *Adverse Impacts Which May Not Be Avoided if the Present Rate Structure Is Maintained*

If the final action taken in this proceeding were to maintain the present rate structure, the adverse environmental effects mentioned under preceding part two (2) may not be avoided absent other regulations or directives limiting the extent to which the forests may be decimated.

As a result of this the following goals set forth in 101(b) of NEPA might be sacrificed:

(1) As trustees of our nation's forests for future generations any activity suiting a present need but disregarding needs of future generations might be a violation of that trust.

(2) We might not be insuring Americans of esthetically and culturally pleasing surroundings.

(3) This might not enhance the quality of renewable resources and would certainly not approach the maximum attainable recycling of depletable resources.

However, if the rates are equalized or the rates on wastepaper established at a lower level than on woodpulp, the

adverse environmental effects possibly inherent in the present rate structure may be eliminated and the recycling of materials may be encouraged with consequential environmental enhancement.

4. *Alternatives to the Present Rate Schedules.*

Possible alternative actions which might be taken on the basis of this proceeding are as follows: (1) lower the rates on wastepaper but still maintain them at a level higher than that on woodpulp—this alternative might somewhat lessen the environmental impacts of maintaining the present rate structure but only in degree, not substantially; (2) equalizing the rates on wastepaper and on virgin woodpulp—this might eliminate the adverse environmental impacts resulting from the present rate structure and could enhance the environment by encouraging the recycling of paper; (3) establish the rates on wastepaper at a lower level than those on woodpulp—this could probably eliminate the adverse environmental impacts resulting from the present rate schedules and could probably be more effective in encouraging recycling of paper, with its many concomitant beneficial environmental effects.

5. *The Relationship Between Local Short-Term Uses of Man's Environment and the Maintenance and Enhancement of Long-Term Productivity.*

The short-term effects of allowing the aforementioned rates to remain as they presently stand may not be substantial; it is, in the long run, through the cumulative exportation of virgin woodpulp instead of wastepaper, that the possible adverse environmental impacts mentioned under preceding part two (2) may come about.

The persons who will pay the environmental costs involved in the long run are those who enjoy our nation's forests. In addition, consumers of wood and woodpulp may suffer financial costs, for as the forests are reduced the cost of virgin woodpulp will certainly increase. In the long run, it is quite possible no one will benefit from continued decimation of the forests unless strict controls are enacted and enforced.

On the other hand, an equalizing of the rates, or lowering of the wastepaper rates below those of woodpulp, may enhance the quality of the environment in the long run. By protecting and preserving our nation's forests now, systematic methods for use and refurbishing of the forests can be developed so both industry and the public can enjoy beneficial use of the forests for years to come.

6. *Irreversible or Irretrievable Commitments of Resources Which May Be Involved in the Present Rate Schedule.*

If the aforementioned rates are maintained as they presently stand, the ensuing probability of continuing exportation of virgin woodpulp where wastepaper could be used instead, may cause irreversible and irretrievable losses to the national forests, particularly in the long run. Steps may, of course, be taken to replace the lost timber, but the drain of the timber resources of the nation will continue. This could reduce the number and diversity of beneficial uses to which the nation's forests can be put. However, if the rates on wastepaper are equalized to, or set at a lower level than, the rates on woodpulp, exporters may be encouraged not to make such irreversible or irretrievable drains on our forests and may be encouaged instead to use recycled and recyclable materials.

Pursuant to section 102(2)(c) of NEPA, the Commission is making this draft environmental impact statement available to the public by publication in the *Federal Register*. The Commission invites the comments of all public and private groups and individuals. A suggested form for such comments is for interested parties to include in their statements an explanation of their respective environmental positions, specifying the differences with, additions to, and comments on this draft statement in context similar to that used in this draft environmental impact statement. An original and fifteen (15) copies will be submitted to the Commission, as well as ten (10) copies to Council on Environmental Quality.

Commentators shall include in their comments a discussion of all statutory authority upon which their arguments are based. This should include, but not be limited to, an application of NEPA authorities and responsibilities to

Commission authority under the Shipping Act, 1916. Comments may be filed on or before January 15, 1973.
By the Commission.

/s/ Francis C. Hurney
FRANCIS C. HURNEY
Secretary

(SEAL)

FEDERAL MARITIME COMMISSION

DOCKET NO. 71-83

COM-CO PAPER STOCK CORPORATION

v.

PACIFIC COAST-AUSTRALASIAN TARIFF BUREAU, ET AL.

DRAFT ENVIRONMENTAL IMPACT STATEMENT

Pursuant to section 102 of the National Environmental (Policy Act of 1969 (42 U.S.C. 4331 (1972)) (hereinafter NEPA), and the Council on Environmental Quality's Guidelines (36 F.R. 7724 (1971)), requiring the preparation of a detailed environmental impact statement whenever an agency of the Federal Government undertakes a major Federal action significantly affecting the quality of the human environment, the Federal Maritime Commission has prepared this draft environmental impact statement concerning certain rates and penalties charged by Pacific Coast-Australasian Tariff Bureau (PCATB) for the shipping of wastepaper, which are alleged by Com-Co Paper Stock Corporation (Com-Co), an exporter of wastepaper, as being unlawful.

1. *The Nature of the Proceeding Before the Commission*

Com-Co is a California corporation engaged in the business of selling and exporting wastepaper and paper products to several foreign countries, including Australia. In the course of such commerce, the wastepaper products Com-Co exports to paper manufacturers in Australia for recycling purposes allegedly compete in foreign trade with virgin woodpulp exported to Australia from Atlantic and

Pacific ports of the United States and from Canada, Europe and New Zealand.

PCATB is an unincorporated association whose principal office is in California. Its membership is comprised of various common carriers by water engaged in the ocean transportation of property in ships between ports on the Pacific Coast of the United States and ports in Australia/New Zealand. PCATB operates by agreement among its member carriers to establish ocean freight rates which are subject to the jurisdiction and control of this Commission under the Shipping Act, 1916 (Title 46 U.S.C. §801, *et seq.*)

Com-Co has filed a complaint with the Commission naming PCATB and its members as respondents. In the complaint Com-Co alleges that PCATB and its member carriers discriminate against Com-Co's wastepaper shipments and grants preferential treatment to exports of virgin woodpulp destined for Australia, in violation of sections 14, 15, 16 (First), 17, and 18(b)(5) of the Shipping Act, 1916 (46 U.S.C. 813, 814, 815, 816, and 17(b)(5)). Complainant also alleges that PCATB's rates and penalties are unlawful because they are contrary to the national environmental policy of the United States expressed in the Solid Waste Disposal Act of 1945, as amended by the Resource Recovery Act of 1970 (Public Law 91-512).

Respondents, in their answer, deny any and all allegations of discrimination against complainant and its wastepaper shipments and deny any preferential treatment to exporters of virgin woodpulp, and seek to have the complaint dismissed for failure to state a claim upon which relief may be granted.

As a result of this complaint, the Commission has assigned this proceeding for hearing. The end result of this process will be a determination of which parts, if any, of the statutes and statutory sections named in the complaint have been violated and in the case of a violation, what action would best ameliorate the situation.

A copy of the Complaint and Answer are available for inspection in the Public Docket Room at the Commission's Washington office.

2. *The Environmental Impact of the Present Rate Schedules.*

The rates as presently filed may have significant environmental impact if complainant's allegations are correct.

Exporters may be encouraged to ship woodpulp from virgin timber instead of wastepaper in situations where properly recycled wastepaper could serve the same purposes as the woodpulp. This could result in a continuing depletion of our forests. If this be the case, the resultant defacing and reduction of areas of scenic beauty and limitation of the number and size of the nation's recreation areas could have serious adverse environmental effects. The habitat of forest wildlife may be endangered in the affected areas with consequential environmental costs. In addition, our national policy to encourage the recycling of solid waste may be thwarted.

If, as a result of this proceeding, the rates are equalized or established so that the rates on the exportation of wastepaper are lower than on woodpulp, exporters might be encouraged to ship wastepaper with concomitant benefits to the recycling process and solid waste disposal. This might tend to lessen the use of virgin timber woodpulp, thereby lessening the depletion of our forests and consequently enhancing the overall environment.

3. *Adverse Impacts Which May Not Be Avoided if the Present Rate Structure Is Maintained*

If the allegations of the complaint are correct and the final action taken in this proceeding were to maintain the present rate structure, the adverse environmental effects mentioned under the preceding part two (2) may not be avoided absent other regulations or directives limiting the extent to which the forests may be depleted.

As a result of this the following goals set forth in 101(b) of NEPA might be sacrificed:

(1) As trustee of our nation's forests for future generations any activity suiting a present need but disregarding needs for future generations might be a violation of that trust.

(2) We might not be insuring Americans of esthetically and culturally pleasing surroundings.

(3) This might not enhance the quality of renewable resources and would certainly not approach the maximum attainable recycling of depletable resources.

However, if the rates are equalized or the rates on wastepaper established at a lower level than on woodpulp, the adverse environmental effects possibly inherent in the present rate structure may be eliminated and the recycling

and disposal of solid waste materials may be encouraged with consequential environmental enhancement.

4. *Alternatives to the Present Rate Schedules.*

Possible alternative actions which might be taken on the basis of this proceeding are as follows: (1) lower the rate structure on the wastepaper but still maintain them at a level higher than that on woodpulp—this alternative might somewhat lessen the alleged adverse environmental impacts of maintaining the present rate structure but only in degree, not substantially; (2) equalizing the rate structures on wastepaper and on virgin woodpulp—this might eliminate the alleged adverse environmental impacts resulting from the present rate structure and could enhance the environment by encouraging the recycling of paper and disposal of solid waste; (3) establish the rates and penalties on wastepaper at a lower level than those on woodpulp—this could probably eliminate the alleged adverse environmental impacts resulting from the present rate schedules and could probably be more effective in encouraging recycling of paper and solid waste disposal.

5. *The Relationship Between Local and Short-Term Uses of Man's Environment and the Maintenance and Enhancement of Long-Term Productivity.*

The short-term effects of allowing the aforementioned rate structure to remain as it presently stands may not be substantial; it is, in the long run, through the cumulative exportation of virgin woodpulp instead of wastepaper, that the possible adverse environmental impacts mentioned under preceding part two (2) may come about.

The persons who will pay the environmental costs involved in the long run are those who enjoy our nation's forests. In addition, consumers of wood and woodpulp may suffer financial costs, for as the forests are reduced the cost of virgin woodpulp will certainly increase. In the long run, it is quite possible no one will benefit from continued depletion of the forests unless strict controls are enacted and enforced.

On the other hand, an equalizing of the rate structure, or lowering of the wastepaper rates and penalties below those of woodpulp, may enhance the quality of the environment in the long run. By protecting and preserving our nation's

forests now, systematic methods for use and refurbishing of the forests could be developed so both industry and the public can enjoy beneficial use of the forests for years to come.

6. *Irreversible or Irretrievable Commitments of Resources Which May Be Involved in the Present Rate Schedule.*

If the aforementioned rate structure is maintained as it presently stands, the ensuing probability of continuing exportation of virgin woodpulp where wastepaper could be used instead, may cause irreversible and irretrievable losses to the national forests, particularly in the long run. Steps may, of course, be taken to replace the lost timber, but the drain of the timber resources of the nation could continue. This could reduce the number and diversity of beneficial uses to which the nation's forests can be put. However, if the rates and penalties on wastepaper are equalized to, or set at a lower level than, the rates and penalties on woodpulp, exporters may be encouraged not to make such irreversible or irretrievable drains on our forests and may be encouraged instead to use recycled or recyclable materials.

The Commission invites the comments of all interested persons in compliance with the procedures set forth in its Notice of Availability of Draft Environmental Impact Statement and Order Regarding Environmental Issues, served February 5, 1973 in this proceeding.

By the Commission.

/s/ Francis C. Hurney
FRANCIS C. HURNEY
Secretary

(SEAL)

UNITED STATES DEPARTMENT OF THE INTERIOR

Office of the Secretary
Washington, D.C. 20240

In reply refer to:
PEP ER-73/461

April 13, 1973

Dear Mr. Oswald:

We have examined the Revised Draft Environmental Statement for Increased Freight Rates and Charges, 1972 (Ex Parte No. 281) in the short time allowed us between its receipt (March 23, 1973) and your letter of April 6, 1973, expressing inability to extend the review period. We hope this review will be helpful in developing an improved statement.

The subject environmental impact statement represents an impressive effort on the part of the Interstate Commerce Commission (ICC) to indicate the potential effects on the environment of the proposed increase in freight rates. However, there are several areas in the proposed statement that need elaboration, clarification, and improvement.

The revised draft is greatly expanded compared to that submitted last year; even so, the fundamental posture of the statement, in our judgment, remains unchanged. The impact statement does not appear to us to meet the requirements of Section 102(2)(C) of the National Environmental Policy Act for providing a careful multi-disciplinary examination of environmental effect.

It appears that the Commission may have misconstrued the purpose of environmental impact statements. The entire first section is devoted to how freight rates are established and why different rates are justified. These are the data, supported by court decisions cited, that judges and hearing examiners need for evaluation of requested rate increases, but such detail is not appropriate in an environmental impact statement for describing the nature and scope of a proposal. Thus, the statement should not justify rate increases; in contrast, it should only assess the poten-

tial environmental consequences of rate changes on all commodities involved—including recyclable materials.

The section on the environmental impact of the proposed actions actually provides a good description of the proposal. The major portion of this discussion should be moved to the description of the action section. The impact section primarily examines the questions (1) whether increased rail freight rates will divert traffic from the railroads to other modes of transportation in degradation of our human environment, and (2) whether the proposed increased rail rates will adversely affect the movement of secondary materials. These are the environmental questions involved, but the environmental impacts expected are not analyzed. Hence, instead of an impact appraisal, the main thrust of the discussion is the justification of increased rail freight rates.

The discussion concerning demand elasticity (page 62) is confusing. This section should be clarified by defining "elasticity of demand" and also by stating explicitly the relationship between the demand elasticity for rail service and the substitution of truck for rail transportation.

The discussion of the relative energy efficiencies and polluting effects of trucks and trains (pages 67-70) should be expanded in view of the recent interest in energy conservation. Environmental effects in the form of engine emissions are properly considered. However, there are also environmental disruptions that come about during the process of recovering energy materials. These disruptions will be minimized if the more energy efficient mode of transportation is utilized.

The section dealing with nonferrous metal scrap (pages 145-149a) needs additional work. The table showing that nonferrous metal scrap prices have increased in recent years and the arguments of the railroads do not provide a substantial basis for illustrating that the rate increases will not have a negative effect on recycling. Also, the unique transportation characteristics of ore and scrap that cause rate differentials require elaboration.

Two comments of an editorial nature seem appropriate also. First, a table of contents for the impact statement would be beneficial to readers. Second, the references to opposing positions as being "simplistic" (pages 36, 59), "one-dimensional" (page 7), or reflecting "naivety" (page 15) are argumentative and could be deleted.

The alternative section presents a discussion of the regulatory framework of rates rather than the alternatives to increased railroad freight rates. The statement acknowledges alternatives such as more efficient rail operations, reduced maintenance costs, and improved railroad equipment. However, they are not expanded as would be desirable.

In summary, no meaningful analysis of this impact statement is really yet possible because the environmental impact is not effectively considered. A suggestion would be to completely restructure the content of the report by incorporating most of the present environmental impact section as the description of the proposed action. A new environmental impact section could then be developed which would actually examine the expected impacts that could result from changes in freight rates. The present introduction section on the establishment of freight rate structures could be used as a separate descriptive section or placed in the appendix.

In our May 8, 1972, response to the statement presented last year, we offered considerably more detail on how the statement could be improved. These suggestions apply equally well to this draft.

Sincerely yours,

Wm. W. Lyons
Deputy Assistant Secretary
of the Interior

Honorable Robert L. Oswald
Secretary
Interstate Commerce Commission
Washington, D. C. 20423

Enclosure

EXECUTIVE OFFICE OF THE PRESIDENT
Council on Environmental Quality
722 Jackson Place, N. W.
Washington, D. C. 20006

Dear Mr. Stafford:

The Council on Environmental Quality continues to maintain a strong interest in the investigations relating to *Ex Parte 281, Increased Freight Rates and Charges, 1972.* As indicated in previous correspondence we have been concerned with both the procedural questions relating to the Commission's implementation of the National Environmental Policy Act (NEPA) and with substantive issues pertaining to the impact of freight rate increases on recycling and the environment.

The Council has reviewed the Draft Environmental Impact Statement on *Ex Parte 281,* served by the Commission on March 13, 1973. We are pleased that the Commission has submitted this statement for review and that interested parties will have the opportunity to comment on it. We feel, however, that there are several respects in which the present statement could be significantly improved by greater objectivity in the Commission's evaluation of the potential impact of its action on the environment.

Among the issues which we feel have not been adequately addressed, are the following:

1. While we would certainly agree that the mere existence of rate differences does not imply rate discrimination, the Commission does not demonstrate that these differentials are justified by inherent cost differences or other factors.

2. In our letter of October 30, 1972, we pointed out the deficiencies of the Commission's approach to the question of the impact of rate changes on scrap consumption. The deficiencies have not been corrected. For example, the Draft Environmental Impact Statement ignores completely the very important consideration of how freight rates might affect long-run decisions on investment in scrap-intensive production facilities, such as electric arc furnaces.

3. The Commission has devoted little effort to analyzing alternative actions within its jurisdiction. We also find it

difficult to believe, for example, that the economic well-being of the nation's railroads is really at stake here. Are there no other rate schemes that could provide the same revenues, without increasing or even maintaining rate differentials which might adversely affect environmental quality?

In this respect, we applaud the Commission for urging railroads "to design incentive rates which can facilitate the movement of recyclable commodities." This is a step forward, but nowhere is it clear why the Commission cannot itself design such rates in response to the mandate in 101(b)(6) of NEPA that the Federal Government act to "enhance the quality of renewable resources and approach the maximum recycling of depletable resources."

We cannot overstate our concern that the comments received in conjunction with this draft statement be analyzed and become an integral part of the final environmental impact statement for *Ex Parte 281*, but we are aware of the difficulties in accomplishing this in a short time period. Consequently it might be desirable to deal with these questions in the general investigation to be conducted under *Ex Parte 270, Investigation of Railroad Freight Rate Structure.* We would be sympathetic to this approach, if as we pointed out in our October 30 letter, the Commission postpones any rate increases on recycled commodities pending completion of *Ex Parte 270*—together with draft and final environmental impact statements.

Once again, we commend the Commission for its efforts in assembling this statement and hope that the deficiencies identified by commenting parties will be carefully considered in preparing the final statement and in evaluating and selecting among possible alternative actions.

Sincerely,

/s/ Russell E. Train
RUSSELL E. TRAIN
Chairman

Honorable George M. Stafford
Chairman
Interstate Commerce Commission
12th & Constitution Avenue, N.W.
Washington, D. C. 20423

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

19 April 1973

Mr. Robert L. Oswald
Secretary
Interstate Commerce Commission
Washington, D. C. 20423

Dear Mr. Oswald:

The Environmental Protection Agency has reviewed the draft environmental impact statement (EIS) on Ex Parte 281, "Increased Freight Rates and Charges, 1972," EPA has classified the EIS as *Category 3—Inadequate*, and has prepared detailed comments, which are attached. We have also attached a description of EPA's EIS classification system.

The draft EIS does not adequately assess the environmental impact of the proposed freight rate increases on the movement of secondary materials, nor does it consider in reasonable detail the range of alternatives to the proposed action.

We urge the Commission to consider our detailed comments in preparing the final EIS.

Sincerely,

/s/ Sheldon Meyers
SHELDON MEYERS
Director
Office of Federal Activities

Attachments (2)

Review of Interstate Commerce Commission Ex Parte 281, Increased Freight Rates and Charges

Draft Environmental Impact Statement for Proposed Rate Increases for Secondary Materials

dated March 13, 1973

United States Environmental Protection Agency

The Environmental Protection Agency's review of the Commission's Draft Environmental Impact Statement finds that the Commission's basic conclusion that the rate increases in question will have no effect on the use of secondary materials and therefore will have no environmental consequences is not adequately substantiated. The Commission's analysis of alternatives to the proposed increases is also judged inadequate.

The conclusion that rail transport has environmental advantages as compared to other modes of transportation is felt to be valid. Furthermore the carriers' need for increased revenues to cover increased operating costs is recognized as necessary in order to maintain a viable rail transportation system in the Nation. It is acknowledged that the environmental damages that would result from a small rate increase for secondary materials might in fact be small. However, there is evidence to indicate that the present rate structure discriminates against the movement of secondary materials. If this is the case, the proposed action would further distort this rate structure, and when combined with past increases could have significant environmental ramifications. Therefore, alternatives to the proposed action that would have resulted in a more equitable rate structure (such as cost-based increase for particular materials) should have been analyzed more thoroughly. For these reasons the Commission's Draft Environmental Impact Statement is found to be inadequate. A more detailed discussion of these points is presented below.

Freight rate increases for secondary materials must result in reduced recycling. While it is difficult to predict the degree to which a specific increase in rates would result in a lower level of recycling of affected materials, the cumula-

tive effects of the proposed increases, together with past increases, result in significantly higher costs for materials transport. The influence of transportation costs on the selling price of a commodity may vary; however, basic economics dictate that some decrease in recycling must result. Present marginal uses of secondary materials and long-range investment decisions in materials processing systems are especially sensitive to these higher costs.

Reduction in the use of recycled materials will have a negative impact on the environment. Data are available which demonstrate the favorable environmental effects of utilizing secondary materials in lieu of virgin materials in various production processes. Reports to the Council on Environmental Quality prepared by Midwest Research Institute document the environmental effects associated with secondary based production processes in the iron and steel, paper, and glass industries. These reports indicate that in most instances there is a reduction in air pollution, water pollution, waste generation and energy consumption when secondary materials are used instead of virgin materials. These reports were made available to the Commission by this Agency in September 1972. Recycling can also result in a reduction in strip mining, conservation of forests, and nonrenewable resources, and a reduction in municipal solid waste disposal burden with all the attendant environmental benefits which accrue to these actions.

There is evidence to indicate that discrimination against secondary materials does exist. The Commission states there is a difference in rates for virgin and secondary materials, and that this difference is not wholly cost-based. Other factors such as competition with other commodities, trade conditions, and value of serivce factors are also considerations in ratemaking. In order to justify rate increases for recycled commodities the Commission should demonstrate that such increases are necessary to offset increased costs to the carriers of shipping *these* commodities.

In light of the current debate over the environmental effects of the rate structure, the cost basis for additional revenue needs from the transportation of secondary materials should be established by the carriers concerned. This would seem imperative in view of the Department of Transportation's *Estimation of the Distribution of Rail Revenue*

Contribution by Commodity Types—1969 (Burden Study), which shows that some secondary materials contribute more revenue over cost than do virgin materials. By granting general rate increases as exemplified by Ex Parte 281, the Commission furthers this possible inequity.

For example, the facts present in the 1969 Burden Study indicate that the average ratio of revenues to fully allocated costs for iron ore are less than one (.95) indicating that such traffic contributes less than its proportional share to the burden of *constant* cost. The same ratio expressed for iron and steel scrap is greater than one (1.22) indicating that the secondary traffic is carrying more than its proportional share of the burden of constant cost. The same ratios applied to *variable costs* indicate a 12 percent greater burden for scrap than for iron ore.

The Commission is in a unique position to obtain the necessary cost information from the carriers to determine if transportation rates for virgin and secondary materials are equitable on a cost basis. Such an effort would not be duplicative of work to be performed elsewhere (Ex Parte 270). The effort could in fact support cost analyses performed under Ex Parte 270 and accelerate the completion of that study.

The Commission attempts to address the issue of cost justification for one material—iron and steel scrap. The Commission, however, uses only Eastern Territory data from the Burden Study to substantiate the need for higher rates for scrap instead of national data. As was demonstrated above an argument can be made that the rates for scrap iron and steel are already contributing more than their share towards meeting full costs of railroad operation. The Commission does not attempt to justify rate increases for any other secondary material on a cost basis.

If the present rate structure discriminates against secondary materials the rate increase in question would act to amplify negative environmental impacts.

There are alternatives to the proposed increase which would avoid negative environmental impacts. Under the conditions of Section 102 of the National Environmental Policy Act, agencies are required to evaluate, from the standpoint of environmental impact, various alternatives to the proposed action. The cursory treatment afforded the various alternatives by the Commission does not fulfill the spirit of NEPA, especially those alternatives which the

Commission is in a unique position to implement under its statutory powers.

The first and most obvious alternative to the proposed general rate increase is a selective increase based on the evidence of need for increased revenue by the railroad for each commodity concerned. As expressed elsewhere in this statement, this appears to be a far more equitable method of meeting the carriers' revenue requirements. The fundamental cost justification of increased rates is not viewed as "special rate treatment" as the Commission suggests. This would not result in subsidization of secondary materials transportation by other commodities, but would merely constitute a step toward correcting an apparently unsatisfactory rate structure.

A second alternative would be for the Commission to act to reduce the cost of the carriers in lieu of increasing revenues. The Commission could utilize its powers of regulation to insist on the establishment of more incentive loading rates similar to the nonferrous schedules already implemented; and its extensive knowledge of the transportation networks and secondary materials industries to assist in the establishment of more efficient schedules, superior loading methods, shorter handling periods and the design of more efficient railroad cars. A more active participation by the Commission in these areas should be welcomed by the railroads and supported by environmental groups as well, especially in that furtherance of a viable rail system is environmentally beneficial.

Comments on actions related to specific recycled commodities. In addition to the general comments made above the following observations concerning the treatment of iron and steel scrap, glass cullet and returnable beverage containers are made.

In the case of scrap iron and steel, the cost information cited by the Commission is insufficient to support a higher percentage rate increase for scrap iron and steel than for other secondary materials. In the absence of suitable cost justification there is no reason for the failure of the Commission to treat scrap iron and steel as a recyclable commodity.

The Commission's assessment of the problems inherent with the use of cullet in glass manufacture are correct. The Commission's decision to proceed with an increase in rates for this commodity, however, appears inconsistent with

their findings. The analysis of the glass industry concluded that an increase in transportation charges "may occasion an indeterminable decline in purchased cullet consumption," yet a three percent increase on cullet was approved.

The Commission has failed to address the environmental impacts of increased freight rates on returnable containers. As was pointed out in EPA's response to the Commission's Order of October 4, 1972, the use of returnable glass containers results in significant environmental benefits as compared to either manufacturing containers from recovered cullet or use of disposable containers. Returnable containers should be treated in a manner similar to other recycled materials.

Conclusion

The Commission has not substantiated the conclusion that there is no environmental consequence of the proposed rate increase for secondary materials. The Commission's reasoning is based on the argument that due to the complex economic and technological factors which influence the use of secondary materials, the effect of the rate increase proposed becomes insignificant.

Any economic factor that increases the cost of a product must impact on its marginal consumption patterns and, more significantly, on long-term investment decision-making. The magnitude of the proposed rate increases, when combined with the effects of past increases, amplifies the impact of transportation charges on the economics of recycled materials use. The Commission has not presented suitable evidence to demonstrate either the absence or negligible magnitude of environmental consequences of the proposed action. In order to establish this, the Commission should provide quantitative data which demonstrate the degree to which secondary materials consumption would decline with the proposed increase. These data should be presented for each secondary material for which a rate increase has been proposed.

The Commission, at the very minimum, should have substantiated the cost basis of the carrier's request for increased revenues from secondary materials. In addition, reasonable alternatives to the proposed action should have been thoroughly analyzed. This information would have

established whether the negative environmental impacts that may result from this action are avoidable. If the Commission had attempted to address viable alternatives to the proposed general rate increase, they would have been more responsive to the requirements of both the Interstate Commerce Act and the National Environmental Policy Act.

Environmental Impact of the Action

LO—Lack of Objections

EPA has no objections to the proposed action as described in the draft impact statement; or suggests only minor changes in the proposed action.

ER—Environmental Reservations

EPA has reservations concerning the environmental effects of certain aspects of the proposed action. EPA believes that further study of suggested alternatives or modifications is required and has asked the originating Federal agency to reassess these aspects.

EU—Environmentally Unsatisfactory

EPA believes that the proposed action is unsatisfactory because of its potentially harmful effect on the environment. Furthermore, the Agency believes that the potential safeguards which might be utilized may not adequately protect the environment from hazards arising from this action. The Agency recommends that alternatives to the action be analyzed further (including the possibility of no action at all).

Adequacy of the Impact Statement

Category 1—Adequate

The draft impact statement adequately sets forth the environmental impact of the proposed project or action as well as alternatives reasonably available to the project or action.

Category 2—Insufficient Informtaion

EPA believes that the draft impact statement does not contain sufficient information to assess fully the environmental impact of the proposed project or action. However, from the information submitted, the Agency is able to make a preliminary determination of the impact on the environment. EPA has requested that the originator provide the information that was not included in the draft statement.

Category 3—Inadequate

EPA believes that the draft impact statement does not adequately assess the environmental impact of the proposed project or action, or that the statement inadequately analyzes reasonably available alternatives. The Agency has requested more information and analysis concerning the potential environmental hazards and has asked that substantial revision be made to the impact statement.

If a draft impact statement is assigned a Category 3, no rating will be made of the project or action, since a basis does not generally exist on which to make such determination.

Figure 3-1. Attachment

ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

June 6, 1973

Mr. Robert L. Oswald
Secretary
Interstate Commerce Commission
Washington, D.C. 20423

Dear Mr. Oswald:

The Environmental Protection Agency has reviewed the final environmental impact statement (EIS) for Ex Parte 281, *Increased Freight Rates and Charges, 1972,* and continues to have reservations regarding the environmental consequences of the proposed actions.

The EIS does not adequately substantiate the conclusion that the proposed general rate increase would have no effect on the shipment of secondary materials and therefore would have no environmental impacts. Furthermore, there are viable alternatives to the proposed action that were not analyzed in sufficient detail. These alternatives, if pursued, would eliminate some of the negative environmental ramifications of the proposed general rate increase.

One alternative, as suggested in our comments on the draft EIS submitted on April 19, 1973, is a cost-based increase for particular materials. If this would prove to be an unreasonable administrative burden for the railroads, it is suggested that the rate increases for secondary materials be postponed until the Commission completes Ex Parte 270, *Investigation of Railroad Freight Rate Structure.* There is evidence that the current rate structure is inequitable in its treatment of some secondary materials and general rate increases tend to perpetuate these inequities.

We recommend that the Commission reconsider its decision to approve the rate increases for secondary materials effective June 7, 1973.

Sincerely yours,

/s/ John Quarles
JOHN QUARLES
Acting Deputy Administrator

[Ex Parte No. 270 (Sub-No. 6)]

Railroad Freight Rate Structure

Investigation of Scrap Iron and Steel

Present: Dale W. Hardin, Commissioner, Coordinator of Ex Parte No. 270, having the authority to institute this investigation.

It appearing, That scrap iron and steel represents a significant volume of the traffic transported by the railroads of this Nation;

It further appearing, That, as disclosed by a comparison of the 1966 and 1969 burden studies, there has been a decline in the net contribution to railroad freight revenues attributable to the transportation of iron and steel scrap;

It further appearing, That in recent rail general increase proceedings, it has been alleged that scrap iron and steel competes with iron ores;

It further appearing, That while the 1969 burden study discloses that iron and steel scrap is one of the top twenty positive revenue contributors for movements within official territory, iron ores are similar disclosed for movements within official territory to be one of the top twenty deficit contibutors to railroad net revenues;

It further appearing, That an investigation of the freight rate structure of scrap iron and steel may be related to, and, at a future date, consolidated with Ex Parte 270 (Sub-No. 5), Investigation of Railroad Freight Rate Structure—Iron Ores;

It further appearing, That while the principal focus of this investigation, as well as other sub-numbered Ex Parte No. 270 investigations instituted by the Coordinator relating to specific commodities, is on (1) the possibly self-defeating nature of general rate increases, (2) the disparities and distortions in the basic rate structure which may have resulted from the recent series of general increases, (3) the uneven effects of general increases on in-

dividual railroads,[1] and (4) the lack of railroad incentive to improve service in line with shipper requirements, it is also incumbent upon the Commission to give due consideration to the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-47 (1970);

And it further appearing, That there are presently available insufficient facts and data to enable the Coordinator properly to assess and quantify the environmental consequences of the numerous alternatives that may be pursued in the investigation program envisioned in this proceeding as required by the NEPA; that participants in the proceeding will be invited in accordance with the further procedures to be established at a later date herein, to submit facts and comments regarding the probable environmental consequences that may result from any action to be taken herein, and that such facts and comments will better allow the Coordinator to assess and define any ecological issues that may be present in this proceeding; that should it be found necessary in this proceeding to follow the detailed environmental impact statement procedures prescribed in section 102(2)(C) of the NEPA, such a statement will be prepared late enough in the development process to contain meaningful information, but early enough so that whatever information is contained in the statement can practically serve as input into the decision-making process (See Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission, decided June 12, 1973, No. 72-1331, United States Court of Appeals for the District of Columbia Circuit); and good cause appearing therefor:

It is ordered, That under the authority of the National Transportation Policy (49 U.S.C. preceding section 1) and the specific provisions of part I of the Interstate Commerce Act, in particular sections 1, 2, 3, 6, 12, 13, 15, 15a, and 20, an investigation be, and it is hereby, insttiuted into the lawfulness of all rates on scrap iron and steel maintained by railroads subject to the Interstate Commerce Act and that said railroads to the extent they participate in the transportation of scrap iron and steel be, and they are hereby, made respondents;

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[1] Although the issue of uneven effects of general increases on individual railroads is to be considered in Ex Parte No. 270 (Sub-No. 3), Investigation of Railroad Freight Rate Structure—Uneven Effects of General Increases on Individual Railroads, evidence with respect to this issue, insofar as it relates to the rates on scrap iron and steel, will be considered relevant in this investigation.

It is further ordered, That any person interested in this proceeding shall file with the Interstate Commerce Commission, Office of Proceedings, Room 5354, Washington, D.C. 20423, on or before November 15, 1973, the original and two copies of a statement of his interest. Inasmuch as the Commission desires wherever possible (a) to conserve time, (b) to avoid unnecessary expense to the public, and (c) the service of pleadings by parties in proceedings of this type only upon those who intend to take an active part in the proceeding, the statement of intention to participate shall include a detailed specification of the extent of such person's interest, including (1) whether such interest extends merely to receiving Commission releases in this proceeding, (2) whether he genuinely wishes to participate by receiving or filing evidence, (3) if he so desires to participate as described in (2), whether he will consolidate or is capable of consolidating his interest with those of other interested parties by filing joint statements in order to limit the number of copies of pleadings that need be served, such consolidation of interest being strongly urged by the Commission, and (4) any other pertinent information which will aid in limiting the service list to be used in this proceeding; that the Commission shall then prepare and make available to all such persons a list containing the names and addresses of all parties desiring to participtae in this proceeding for the purpose specified in (2) above; and that persons not timely filing a statement of intention by November 15, 1973, will not be permitted to participate except upon a showing of good cause for such late participation and leave granted;

It is further ordered, That following the circulation of the service list, a procedural order will be entered by the Coordinator directing the further procedures that must be followed in this investigation proceeding.

And it is further ordered, That notice of this order shall be given to the general public by depositing a copy in the office of the Commission's Secretary and by filing a copy with the Director, Office of the Federal Register, for publication in the FEDERAL REGISTER.

Dated at Washington, D.C., this 28th day of September, 1973.

By the Commission, Commissioner Hardin, Coordinator.

[SEAL] ROBERT L. OSWALD,
Secretary.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

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ABERDEEN AND ROCKFISH RAILROAD COMPANY, *et al.*,
Appellants,

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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July 1974

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No.

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Appellants,

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STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

The appellants, Aberdeen & Rockfish Railroad Company, *et al.*, ("the railroads") which are listed at pp. 2a-13a below, appeal from an order and decision of a three-judge District Court sitting in the District of Columbia which vacated orders of the Interstate Commerce Commission relating to railroad rate increases and remanded the case to the Commission for further proceedings.

OPINIONS BELOW

The opinion of Judge Wright and the dissenting opinion of Judge Flannery, which are reprinted at Appendix A of the Government's jurisdictional statement,[1] are reported at 371 F.Supp. 1291. The ICC's report in *Ex Parte No. 281* served on October 4, 1972, which is reprinted in pertinent part at Gov. J.S. App. D, is reported at 341 I.C.C. 290; the ICC's order served on May 7, 1973, which is reprinted at Gov. J.S. App. E, is unreported; and the ICC's final environmental impact statement is reported at 346 I.C.C. 88.[2]

JURISDICTION

This suit was initiated by appellee SCRAP in the District Court in May 1972, pursuant to 28 U.S.C. §§ 1336, 2321-25, to enjoin orders of the ICC. The decision and order of the District Court at issue in this appeal, which are reprinted respectively at Gov. J.S. App. A and App. D, were entered on February 19, 1974. On April 19, 1974, appellants Aberdeen and Rockfish Railroad Company, *et al.*, filed in the District Court a notice of appeal to this Court, which is reprinted at p. 1a below, and on June 13, 1974, Mr. Chief Justice Burger extended the time to docket the appeal to and including July 2, 1974. Jurisdiction of the appeal is conferred on this Court by 28 U.S.C. § 1253. See *Baltimore & O.R.R.* v. *United States,* 386 U.S. 372 (1967).

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[1] The United States and the Interstate Commerce Commission have appealed from the same order and decision that is the subject of this jurisdictional statement. Their jurisdictional statement is hereafter cited as "Gov. J.S."

[2] We are advised that the Government is furnishing to the Court separate copies of the October 4 report and the final environmental impact statement.

STATUTE INVOLVED

The statutory provision pertinent to this appeal is Section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C), which reads in pertinent part as follows:

"The Congress authorizes and directs that, to the fullest extent possible: . . . (2) all agencies of the Federal Government shall—

* * *

"(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be

made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes. . . ."

QUESTIONS PRESENTED

In November 1972 the Interstate Commerce Commission suspended general rate increases filed by the railroads on virtually all interstate freight traffic so far as the increases applied to recyclable commodities. The ICC then prepared a draft environmental impact statement, received comments upon it, and shortly before the end of the suspension period issued a final impact statement concluding that the increases would have no significant adverse effect on the quality of the human environment. In the decision here under review, the District Court vacated the ICC's orders respecting the rate increases on recyclable commodities on the ground that the impact statement was inadequate. The questions presented are:

1. Does the District Court have jurisdiction to review general revenue orders issued by the Commission which did not determine the justness and reasonableness of any particular rates but merely terminated suspensions of carrier-made rates shortly before the conclusion of the maximum statutory suspension period?

2. Does the National Environmental Policy Act contemplate that courts will review the substantive determinations made by agencies in their environmental impact statements and, assuming *arguendo* that such review is permitted, does the District Court have any adequate basis for setting aside the ICC's

extensive and detailed environmental impact statement in this case or any authority to prescribe on remand what evidence, arguments and procedures may or may not be adopted by the agency?

3. Where the sole and exclusive decision in a general revenue proceeding is reached by the Commission itself, does NEPA require that the agency not only accompany its decision with an environmental impact statement but also that the impact statement be prepared before the Commission even commences the collection and sifting of evidence?

STATEMENT OF THE CASE

In *United States* v. *SCRAP*, 412 U.S. 669 (1973), this Court reviewed and reversed an injunction issued in July 1972 by the District Court for the District of Columbia prohibiting the railroads from collecting a 2.5 percent temporary emergency surcharge so far as it applied to recyclable commodities. While that case was pending in this Court, the ICC completed proceedings relating to general increases on freight rates, varying from commodity to commodity but averaging about 4 percent, which were designed to replace the temporary emergency surcharge. In June 1973, the District Court preliminarily enjoined the general increases so far as they applied to recyclable commodities. Mr. Chief Justice Burger granted a stay of the injunction, and this Court denied an application to vacate the stay. 413 U.S. 917 (1973).

In November 1973, this Court vacated the District Court's preliminary injunction and remanded for further consideration in light of *Atchison, T. & S.F. Ry.* v. *Wichita Board of Trade*, 412 U.S. 800 (1973). 414 U.S. 1035-36 (1973). In the meantime, the appellees moved

in the District Court for a permanent injunction and declaratory relief. In February 1974, the District Court, with Judge Flannery dissenting, vacated the Commission's orders which sanctioned railroad rate increases on recyclables and remanded the case for further proceedings. 371 F. Supp. 1291. It is this order and decision which are the subject of the present appeal.

A. Background Facts.[3] In March 1972, not long after the railroads introduced a 2.5 percent temporary emergency surcharge on nearly all freight rates, they filed tariffs providing for permanent increases on almost all commodities. These increases, averaging about 4 percent, were intended to supersede the flat surcharge. On April 24, 1972, shortly before the new increases were to become effective, the Commission suspended the increases for the full seven-month period permitted by Section 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7), to and including November 30, 1972, and proceeded to investigate them.

The Commission accepted written evidentiary submissions, permitted cross-examination of witnesses, and in June 1972 heard oral argument. On October 4, 1972, it served a lengthy report directed to the permanent increases. 341 I.C.C. 290. The report, almost 300 pages long, examined in detail the railroads' revenue needs, environmental considerations, and the application of the proposed increases to a large number of commodity groups comprising a vast number of indi-

[3] Certain of these facts were discussed in the railroads' brief in this Court in the *SCRAP* case and there is a brief summary of them contained in that decision. 412 U.S. at 683 n. 11. They are restated in this jurisdictional statement for the convenience of the Court.

vidual commodities. The Commission determined to allow the increases to go into effect before the end of the suspension period, provided that the railroads established certain limits on certain of the increases, but the Commission did not definitively determine the lawfulness of any individual rates on particular movements. 341 I.C.C. at 528-30.

The October 4 report confirmed the railroads' critical need for increased revenue. It showed that the proposed increases, even if made fully effective, would cover only about one-fourth of the $1.6 billion increase in costs which the railroads had suffered between the last general rate increase and April 1972; and the computation did not reflect additional cost increases, exceeding three-quarters of a billion dollars annually, scheduled to become effective between April 1972 and April 1973, largely as a result of new wage and tax increases.[4] The report also considered other indices of financial condition such as working capital, equipment obligations, cash flow, and rate of return. *Id.* at 303-08. For example, it found that net working capital, a key index of financial condition, had continued to decline steadily and had now approached or reached a *deficit* figure, depending on the region and method of computation. *Id.* at 304.

The report extensively discussed environmental considerations, including the limited role played by rate levels as compared with service factors and the rail-

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[4] 341 I.C.C. at 297-303; affidavit of William F. Betts, Dec, 12, 1972, para. 5, submitted to the court below. The railroads have since estimated that the increases represent approximately $350 million annually, including $340 million on nonrecyclables and $10 million on recyclables. Betts aff'd, para. 6.

roads' own incentive not to apply the increases where this could result in loss of traffic. 341 I.C.C. at 322-25. It also examined the application of the increases to specific groups of recyclable commodities such as iron and steel scrap, paper scrap, textile waste, and others. *Id.* at 358-69, 392-413. It concluded that the increase would have no significant adverse effect on the quality of the environment, and for this reason the Commission did not prepare a formal environmental impact statement.[5]

The increases on nonrecyclables became effective on October 23, 1972, but the Commission's report continued the suspension on recyclables in order to receive further comments. 341 I.C.C. at 571. A number of interested parties including the Council on Environmental Quality ("CEQ") and the Environmental Protection Agency ("EPA") urged the ICC to prepare a full environmental impact statement on the recyclables despite the report's conclusion that there would be no adverse environmental impact. On November 7, 1972, the Commission entered an order suspending the selective increases on recyclables for the statutory seven-month period to and including June 10, 1973, and it reopened the proceeding to consider further the environmental issues.[6]

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[5] Under the National Environmental Policy Act ("NEPA"), Section 102(2)(C), 42 U.S.C. § 4332(2)(C), it is only where such a significant impact will occur that an agency is required to prepare an environmental impact statement. Although the District Court in its July 1972 decision said that a bare finding of no impact by the agency would not satisfy this requirement, it stated that the case might appear differently "if the record revealed a detailed study by the Commission at the conclusion of which it found no significant environmental impact and, hence, no need for an impact statement." 346 F. Supp. at 201 n.17.

[6] What the Commission suspended was the portion of the new tariff filed by the railroads in October 1972, following the October

On the same day that the Commission entered this order, SCRAP filed papers in the District Court seeking to enjoin the increases both on recyclable and nonrecyclable commodities. On January 9, 1973, the District Court denied the requested injunction. *SCRAP* v. *United States,* 353 F. Supp. 317 (D.D.C. 1973). It held that no injunction was required with respect to the increases on recyclables since those increases had been suspended. As for the nonrecyclables, the court gave a number of reasons for denying injunctive relief: these included "the obvious fact that it is in their [the railroads'] own self interest to request and implement rate increases only where there is no reasonable prospect of diversion to other means of transport" (*id.* at 323) and "the substantial and irreparable harm to the nation's railroads that such relief would cause." *Id.* at 323-24.[7]

B. The Environmental Impact Statement. Shortly after reopening the investigation in November 1972, the ICC moved to supplement the already extensive body of information concerning environmental issues that had been reflected in its October 4 report. In December 1972, it published a 32-page bibliography of articles and

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4 report, so far as the tariff provided for general increases on recyclables effective November 12, 1972. Since these were largely the same rates that had been suspended in April 1972, it is questionable whether the Commission had power unilaterally to suspend the rates for an additional seven months. However, the railroads, as they have in other instances, consented to the further suspension in this case.

[7] The railroads had filed extensive affidavits to show that an injunction against the general increases on nonrecyclables would have a catastrophic effect on the railroad industry; these affidavits showed that the revenues involved were critical not only to maintain adequate transportation service in the country but also to fund the railroads' own increasingly extensive environmental programs.

studies concerning recycling and related matters and it requested that interested parties supplement this list of relevant materials.[8] A number of different parties did file responsive statements and the Commission's notice stated that a further opportunity for comment would be provided after release of a draft environmental impact statement.

The Commission issued its draft impact statement on March 5, 1973. A number of parties submitted comments including CEQ and EPA. The comments of SCRAP, the appellee Environmental Defense Fund ("EDF"), and EPA were critical; those of CEQ were somewhat more measured and concluded: "Once again, we commend the Commission for its efforts in assembling this statement and hope that the deficiencies identified by commenting parties will be carefully considered in preparing the final statement and in evaluating and selecting among possible alternative actions." Letter from Russell Train to Chairman Stafford, April 17, 1973, p. 3.

After reviewing comments from interested persons, the Commission on May 7, 1973, served its final environmental impact statement relating to the selective increases on recyclable commodities. 346 I.C.C. 88.[9] It concluded that the increases in question would *not* have a significant adverse effect on the environment and it also concluded that any unanticipated environmental costs which might result were outweighed by the eco-

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[8] A copy of the bibliography is attached as Appendix A to the final environmental impact statement which is discussed below.

[9] A Commission order incorporating the impact statement and discontinuing the proceeding accompanied the impact statement. See Gov. J. S. App. E.

nomic benefits derived from the sound rail transportation service which would be fostered by the additional revenues. *Id.* at 236-37. It based this conclusion upon 150 pages of discussion, followed by nearly 40 pages of appendix materials.

The impact statement examined the nature of the railroad rate structure and related allegations that the existing structure discriminates against recyclable commodities. *Id.* at 102-33. It considered whether the increases would divert traffic from rail to truck to the detriment of the environment. *Id.* at 136-43. It reviewed claims that the increases would deter the movement of recyclables, first considering recyclables as a class and then examining particular major categories of recyclable commodities. The statement discussed separately iron and steel scrap (*id.* at 148-60); paper scrap (*id.* at 160-76); textile wastes (*id.* at 177-82); petroleum refining waste and waste sulfides (*id.* at 182-85); scrap glass (*id.* at 186-95); nonferrous metal scrap (*id.* at 196-01); plastic scrap (*id.* at 202-09); and fly ash and other industrial ashes (*id.* at 209-15).

A major share of the discussion of particular commodities was devoted to iron and steel scrap since it constitutes by far the largest category of recyclable materials shipped by rail.[10] The ICC discussed *inter alia* the nature of the steel-making industry, steel technology, and the scrap industry structure and its tech-

[10] Based on transportation revenues, iron and steel scrap represents approximately 50 percent of the rail shipments of recyclables or as much as all other categories together. Iron and steel scrap is significant in another respect: rail transportation of this scrap is concentrated in the northeastern United States, financially the most seriously stricken of the three transportation districts.

nology; demand and pricing patterns for iron and steel scrap which, as was true of recyclables generally, revealed no evidence "that secondary commodities either are being diverted to other modes of transportation or are not moving as a result of past rail freight rate increases" (346 I.C.C. at 145); the comparative rail freight costs to shippers of moving scrap and of moving raw materials needed to produce the same amount of iron and steel; and the existing rate *advantage* scrap enjoys vis-a-vis raw materials, an advantage which will be increased by the rate increases in question. *Id.* at 145-47, 148-60.[11]

In addition, the Commission considered the adverse effects of *not* having the increases in question. It stated that "the railroads require these increases to continue to operate in an economic and efficient manner. Failure to approve these increases would endanger the continued existence of the railroads, and, accordingly, would have a far greater potential adverse effect upon the quality of our environment than any minor diversion from rail carriage that may occur now." *Id.* at 217. The ICC also considered alternatives to the proposed rate increases including the further extension of multi-

[11] The Commission found (*id.* at 159) that "the shipping cost per ton of [iron and steel] scrap without the *Ex Parte No. 281* rate increase is $5.58, while the total transportation cost of the equivalent amount of raw materials is $8.49. With the present rate structure, it costs $2.91 less to ship scrap than the comparable raw materials. With the implementation of *Ex Parte No. 281*, the average cost of transporting 1 ton of scrap will be $5.83, and the cost of transporting the comparable raw materials $8.87. Thus, shippers would need to pay $3.04 more to transport raw materials than the corresponding amount of scrap. . . . The difference in transportation costs of raw materials and scrap will increase with *Ex Parte No. 281*, favoring scrap by an additional 13 to 16 cents."

ple-car rates on scrap, hold-downs of increases on recyclable commodities, subsidies to carriers and similar alternatives. *Id.* at 218-35.

C. The District Court's Preliminary Injunction. The final impact statement was served by the Commission on May 7, 1973, but no immediate action was taken by either SCRAP or EDF. Then, on May 30, eight days before the impact statement became effective, those two organizations filed a short motion in the District Court for a preliminary injunction against the new increases on recyclables which the railroads intended to make effective at the end of the suspension period on June 10, 1973. On June 7, 1973, the day the Commission had contemplated that its final impact statement would become effective, the District Court preliminarily enjoined the Commission and the railroads from collecting the proposed increases on recyclables "until further order of this court." Order of June 7, 1973. The four-paragraph injunctive order contained conclusory assertions that the appellees had made a sufficient showing of likelihood of success and that without relief irreparable injury would occur through unnecessary extraction of raw materials. The order also stated, inaccurately and without explanation, that injunctive relief "will not substantially harm the railroads." *Id.*[12]

On June 8, 1973, the railroads filed an application in this Court for a stay of the District Court's order. Following submission of oppositions, Mr. Chief

[12] The general increases on recyclables in fact represent approximately $10 million per year in increased revenues. Affidavit of William F. Betts, June 6, 1973, para. 2, submitted in this Court in connection with the railroads' application for a stay of the District Court's preliminary injunction of June 7, 1973.

Justice Burger granted a stay of the injunction.[13] Thereafter, the increases on recyclables were placed in effect and continue in effect today.[14] On November 19, 1973, this Court for the second time in the course of this litigation overturned the judgment of the District Court, and it remanded the case for further consideration in light of *Atchison, T.&S.F.Ry.* v. *Wichita Board of Trade,* 412 U.S. 800 (1973). 414 U.S. 1035-36.

D. Present Proceedings. While the appeal of the District Court's preliminary injunction was pending before this Court, the appellees filed motions for summary judgment in the District Court.[15] These parties sought two principal forms of relief: first, a declaration that the ICC's environmental impact statement in *Ex Parte No. 281* was inadequate and unlawful, and an order requiring the ICC to revise its environmental impact statement in accordance with what appellees deemed to be the requirements of NEPA; and second, permanent injunctive relief forbidding the railroads from collecting the permanent rate increases on recyclables which were the subject of *Ex Parte No. 281* or from

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[13] SCRAP, EDF, and one of the trade associations subsequently filed applications with the full Court to vacate the stay issued by the Chief Justice. On June 25, 1973, this Court denied the application to vacate the stay. 413 U.S. 917.

[14] The increases became effective on June 10, 1973. They were subsequently discontinued as the result of the President's price-freeze order. When the freeze terminated, the increases were reinstituted.

[15] In addition to SCRAP, which filed a motion for summary judgment below, the following intervenors also filed such motions: the EDF and two associated organizations, the National Parks and Conservation Association and Izaak Walton League of America; the National Association of Recycling Industries, Inc., ("NARI") and three of its members; and the Institute of Scrap Iron and Steel, Inc. ("ISIS") and one of its members.

collecting any further rate increases on recyclables obtained in any subsequent proceeding unless and until the ICC complied with what appellees claimed to be the requirements of NEPA.

In response, the railroads filed a memorandum and numerous supporting affidavits.[16] The affidavits established the substantial and irreparable losses totalling $10 million per year that an injunction against rate increases on recyclables would cause the railroad industry; the readily identifiable cost increases, greatly in excess of additional revenues, the railroads continue to suffer;[17] and the extremely serious condition of the railroad industry as a whole.[18] The affidavits also demonstrated that any significant reduction in the railroads' revenues would, in light of their financial state, be trans-

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[16] Included among these were an affidavit from Mr. Betts, Vice President for Economics and Finance of the Association of American Railroads; affidavits from railroad experts in the transportation of ferrous scrap and nonferrous metal scrap, paper scrap and textile waste, rubber scrap, plastic scrap and chemical wastes, and glass scrap; affidavits from two major steel companies, Bethelehem and National; and affidavits of seventeen individual railroads.

[17] Increased costs incurred since the last general revenue proceeding represent $2.2 billion on an annual basis reckoned through April 1973 and over $2.7 billion through February 1974. Betts aff'd, para. 4. By contrast, rate increases obtained since the start of *Ex Parte No. 281* provide only $650 million on an annual basis, including the increases on recyclables here at issue, representing only about 30 percent of the readily identifiable cost increases incurred through September 1973. Betts aff'd, paras. 4-6.

[18] The serious financial plight of the railroads was confirmed by virtually all of the railroad affidavits. See, *e.g.*, Central of New Jersey aff'd, paras. 2-5; Rock Island aff'd, pp. 2-3. In several cases, including the Penn-Central and Reading, railroads currently in reorganization were now confronted with serious shortages of cash necessary simply to maintain operations.

lated directly into poorer service for the public.[19] Furthermore, the affidavits showed that an injunction would have had an immediate and adverse impact on the environment as well as rail transportation service generally.[20] In addition, the affidavits revealed that the increases here at issue will not discourage the movement of recyclable commodities by rail or result in their diversion to trucks.[21] Finally, the affidavits demonstrated

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[19] The affidavits showed, for example, that the loss of the $10 million in annual revenues here in question would mean that maintenance must be reduced, new cars cannot be financed, and the railroads' physical plant including track must be allowed to deteriorate even further, causing still more serious transportation problems in the future. *E.g.*, Burlington Northern aff'd, paras. 5, 16; Milwaukee aff'd, para. 16.

[20] Reduced service, decreased car supply, and deteriorating plant impair the railroads' ability to transport all commodities (*e.g.*, Lehigh Valley aff'd, para. 5; MKT aff'd, p. 4), and bear with particular force on recyclable materials because many of them cannot feasibly be moved unless they are moved by rail. See, *e.g.*, Betts aff'd, para. 9. In addition, the railroads' own environmental programs, which now cost approximately $100 million per year to maintain at their current level, would be adversely affected by the injunction (Betts aff'd, para. 10), including major expenditures for diesel emission control; roadside fire control; weed and brush control; pollution control at maintenance shops; separation of oil from drainage; and elimination of stationary stack emissions. See, *e.g.*, Illinois Central Gulf aff'd, p. 7; Southern Pacific aff'd, p. 4, paras. 17-18.

[21] This is established by the railroads' own past experience, (*e.g.*, Southern aff'd, pp. 4-5); their experience with the increases involved in this case (*e.g.*, Reading aff'd, para. 7); and experts familiar with individual commodities. See note 16, above. Notably, a graph comparing rail rate increases on ferrous scrap during the past five years and figures showing the actual tonnage of such scrap moved by the Penn Central in this period vividly demonstrates that there is *no correlation* whatever between the two. See Scanlan aff'd, ex 1. Two major ferrous scrap *purchasers*—Bethelehem Steel Corporation and National Steel Corporation—filed affidavits which affirm that the rail rates do not

that rail rate charges are carefully calculated to avoid increases which would risk a loss of traffic and thereby defeat the purpose of the increases.[22]

On February 19, 1974, the District Court, with Judge Flannery in dissent, vacated the Commission's order sanctioning the rate increases on recyclable commodities and remanded the case to the Commission for further proceedings with respect to the environmental issues involved. 371 F. Supp. 1291. The court refrained, however, in light of this Court's decision in *Wichita Board of Trade,* from enjoining the railroads from collecting the increased rates on recyclables pending the Commission's reconsideration. The United States, the Commission, and the railroads have appealed from the District Court's order and decision.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The present appeal raises fundamental questions concerning the jurisdiction of a statutory three-judge court convened to review ICC orders. Under a long-standing line of decisions, the ICC's general revenue orders assailed in this case have never been deemed reviewable orders, and this Court's decision in *SCRAP* confirms

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affect the amount of ferrous scrap purchased by them because the amount of scrap purchased depends directly on the demand for steel. Cressman aff'd; Webster aff'd.

[22] See, *e.g.*, N&W aff'd, para. 5. The increases here involved were in fact quite modest both in comparison with past increases (see Southern aff'd, p. 5) and in comparison with the value of the commodities. Where general increases may threaten to discourage or divert traffic because of local circumstances, the railroads meet the problem by applying individual hold-downs limiting or rendering inapplicable rate increases for particular movements. See, *e.g.*, Lehigh Valley aff'd, para. 6.

that NEPA has not altered these jurisdictional limitations. Since general revenue proceedings occur frequently and often involve hundreds of millions of dollars, the District Court's refusal to follow these decisions presents an important and recurring question.

Serious questions relating to the requirements of NEPA and the standards for judicial review are also raised by the lower court's invalidation of the ICC's exhaustive impact statement. Contrary to sound authority, the lower court in evaluating the statement substituted its judgment for that of the expert agency. In addition, it established requirements for impact statements that have no basis whatever in the governing statute and would seriously impair the ICC's ability to maintain a sound railroad system in the United States.

1. A substantial question is presented whether the lower court had authority to act in this case. As its opinion in this case plainly shows (see 371 F. Supp. at 1310) the court's decision was directed specifically against two orders of the ICC entered in a general revenue proceeding and a related environmental impact statement: one order implemented the Commission's report of October 4, 1972, and the other order, served on May 7, 1973, adopted the final impact statement and terminated the reopened proceeding. The lower court's authority to review the impact statement depends, of course, on its authority to review the ICC orders themselves.[23]

[23] The lower court is a statutory three-judge court empowered to review ICC "orders" (28 U.S.C. §§ 1336(a), 2321-25), and the decision below explicitly recognized that the District Court's authority to review the ICC orders presented a threshold jurisdictional problem. 371 F. Supp. at 1296-98.

Each of these orders reviewed by the lower court terminated the suspension of the rates shortly in advance of the end of the seven-month period, and, if neither order had been issued, the rates would still have become effective by operation of law at the end of the period. In neither order did the ICC make any finding that the particular rates at issue were just and reasonable, and neither of them cut off the rights of any interested party to file a complaint with the Commission to establish that particular rates are unlawful. Instead, the ICC's determinations were typical of general revenue proceedings, for they represented only initial judgments about broad rate categories based principally upon an appraisal of railroad revenue needs.[24] Because they do not foreclose shipper remedies or determine finally the lawfulness of any individual rate, the general revenue orders are comparable to suspension orders directed to particular rates, and their basic function—as this case demonstrates—is to fix the duration of a suspension involving numerous rates.[25]

For almost 40 years it has been the settled rule in the lower courts that general revenue orders, like suspension orders directed to individual rates, are not review-

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[24] See *United States* v. *SCRAP, supra,* 412 U.S. at 692 n. 16; *New England Divisions Case,* 261 U.S. 184, 196-197 (1923); *United States* v. *Louisiana,* 290 U.S. 70, 76-77 (1933).

[25] The present case is thus quite unlike *Wichita* where the Commission had held definitively that the particular rates there at issue were just and reasonable. In fact, this Court in *Wichita* contrasted the order there involved with general revenue orders, observing that if the grain charge "were just like a general rate increase, serious questions would arise about the jurisdiction of the District Court to review the Commission's order." 412 U.S. at 814 n. 10.

able.[26] The rule, as the cases disclose, is based upon sound policy considerations including an unwillingness of courts to interfere at what is merely an intermediate stage in the rate-making process, the availability of further remedies focusing upon individual rates, and the dangers of disruption and inconsistency that would result from review of general revenue orders. Most recently this Court left standing two such lower court decisions in the *Atlantic City* and *Alabama Power* cases cited in the margin (note 26); in both cases this Court divided evenly on the question whether the Commission's findings relating to carrier revenue needs were subject to review in the context of general revenue orders.[27]

More importantly, in the same Term that *Atlantic City* and *Alabama Power* were decided, this Court unanimously *affirmed per curiam* the decision of the District Court in *Electronic Industries Ass'n* v. *United States, supra* (see note 26). In that case, the attack was directed not to revenue-need findings but to

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[26] See, *e.g.*, *Algoma Coke & Coal Co.* v. *United States*, 11 F.Supp. 487 (E.D. Va. 1935); *Koppers Co.* v. *United States*, 132 F.Supp. 159 (W.D. Pa. 1955); *Florida Citrus Comm'n* v. *United States*, 144 F. Supp. 517 (M.D. Fla. 1956), *aff'd mem.*, 352 U.S. 1021 (1957); *Atlantic City Elec. Co.* v. *United States*, 306 F. Supp. 338 (S.D.N.Y. 1969), and *Alabama Power Co.* v. *United States*, 316 F.Supp. 337 (D.D.C. 1970); *both aff'd by an equally divided Court*, 400 U.S. 73 (1970); *Electronic Industries Ass'n* v. *United States*, 310 F. Supp. 1286 (D.D.C. 1970), *aff'd per curiam*, 401 U.S. 967 (1971).

[27] *Alabama Power* clearly involved an attack on revenue-need findings. In *Atlantic City*, the gravamen of the complaint was less certain, but the United States urged that the case be considered by this Court on the same basis as *Alabama Power*.

the application of the general increase to particular categories of rates. Similarly, the basic thrust of the appellees' claims here concerns the Commission's treatment of particular categories of rates applicable to recyclable commodities, and accordingly the reviewability question is governed directly by this Court's decision in *Electronic Industries.*

While the lower court disagreed with this Court's decisions in the cases discussed above (371 F. Supp. at 1296), it principally contended that "*the existence of NEPA* requires us to reconsider the application of these doctrines and *in NEPA cases* to accept more of the broad jurisdictional authority granted us." *Id.* at 1298 (emphasis added). But this Court's opinion in *SCRAP* shows by clear analogy that the involvement of NEPA and the assertion of environmental claims do not alter pre-existing jurisdictional rules. *SCRAP* emphasized that nothing in NEPA or its legislative history reflected any congressional intent to alter the rule that courts may not "suspend" rates by injunction when the Commission has chosen not to do so or when the statutory suspension period has expired. Similarly, nothing in NEPA or its legislative history bespeaks any intention to overturn the settled rule against judicial review either of suspension orders directed to individual rates or of general revenue orders directed to rates as a whole.

It is unnecessary to belabor the importance of this jurisdictional question. In view of prior decisions, it presents a serious legal issue; indeed, the lower court's decision appears to be directly inconsistent with the decisions of this Court in *Electronic Industries* and *SCRAP*. Moreover, given the succession of general rev-

enue cases, the question is necessarily a recurring one.[28] Finally, general revenue proceedings typically involve millions and even hundreds of millions of dollars of revenue on an annual basis; the $350 million in annual revenue involved in *Ex Parte No. 281,* including $10 million attributable to recyclables, is by no means unusual. Thus, the practical significance of a prompt and definitive determination of the issue by this Court is apparent.

2. The District Court determined that the ICC's elaborate environmental impact statement was invalid even though the court conceded that the statement met "the prescriptions of NEPA as to form." 371 F. Supp. at 1301. Its action raises at the outset a fundamental question on which the circuit courts are divided: whether NEPA intended to sanction judicial review, under some as yet undefined standards, of the *substantive merits* of the agency's impact statement determinations.

NEPA's impact statement procedure was designed to assure that the agency would take a careful look at the possible environmental consequences of its action and it was not intended to dictate the particular result to be reached by the agency.[29] Section 102(2)(C) provides that where the agency is reporting on a major federal

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[28] There have been general revenue proceedings since early in this century (*e.g., Ex Parte No. 74,* 58 I.C.C. 220 (1920)) but they have become much more frequent in recent years because of the railroads' financial condition and the accelerating increase in operating costs. Since 1960 such proceedings have been commenced almost every year.

[29] *Jicarilla Apache Tribe of Indians v. Morton,* 471 F.2d 1275 (9th Cir. 1973); *Monroe County Conservation Council* v. *Volpe,* 472 F.2d 693 (2d Cir. 1972); *Committee To Stop Route 7* v. *Volpe,* 346 F. Supp. 731 (D. Conn. 1972).

action for which an impact statement is required, it shall include "a detailed statement" on "the environmental impact of the proposed action" and related specific subjects of inquiry. It also directs that prior to issuing the statutory statement, the agency shall obtain the comments of other federal agencies which have jurisdiction or expertise relating to the environmental impact involved. *Id.*.

Here, the Commission's final impact statement certainly did constitute "a detailed statement" on the alleged environmental impact of the proposed action. In 150 pages of analysis, it addressed each of the related topics specified in the statute: whether there would be any unavoidable adverse environmental effects as a result of its action; alternatives to the proposed action; the relationship between local short-term use of man's environment and the maintenance and enhancement of long-term productivity; and the irreversible and irretrievable commitments of resources which would be involved in the proposed action were it implemented. And the final statement was issued only after the ICC received and reviewed comments on the draft statement obtained not only from other federal agencies, but also from the public at large including the appellees. See p. 10, above.

An examination of the lower court's criticisms of the impact statement shows that the court's basic quarrel was with the merits of the Commission's determinations. For example, it complains because the Commission chose to rely on one type of study rather than another. 371 F.Supp. at 1303. [30] It argues that the impact

[30] The court said, for instance, that "the statement does not offer any rigorous price sensitivity studies of its own" but "relies on general discussions of past scrap demand trends" and on "the

statement does not specifically respond to one or another of the many different points and studies considered in the voluminous proceeding. *Id.* It asserts inaccurately that the Commission limited itself exclusively to the environmental effects of the rate increase in question and failed to address the alleged underlying discrimination against recyclables in the existing freight rate structure. *Id.* at 1303-04.[31] In short, these attacks are directed at the Commission's consideration and evaluation of particular facts, the inferences the Commission has drawn, and the judgments it has made in the course of its careful examination of the environmental issues raised by its proposed action.

Other criticisms of the court, while phrased in more general terms, similarly comprise nothing more than disagreement with the Commission's substantive deter-

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concurrence of past scrap demand and rate increases." *Id.* at 1303. And the court indicated its preference for a "study of the contribution to costs made by each category of recyclable commodities and the primary goods with which they compete." *Id.* at 1306.

[31] In fact, the Commission did consider these charges, and concluded that based on the underlying costs of transporting commodities, recyclables such as iron and steel scrap actually enjoy a preference as compared with the raw materials with which they supposedly compete and this preference would not only be maintained but widened by the selective increases involved in *Ex Parte No. 281.* See, *e.g.*, p. 12, n. 11 above. It was, moreover, entirely proper for the Commission to devote principal attention to the particular agency action under consideration—which involved the general increases on recyclables—since this is what NEPA's language clearly contemplates. Finally, the Commission has underway a broad proceeding denominated *Ex Parte No. 270* which is considering various aspects of the railroad freight rate structure including the basic rate structure so far as it may bear on environmental interests.

minations. For example, the court complains about the statement's "language and style" as reflecting the Commission's insensitivity to environmental values. It says that the ICC appears to find no merit in environmental arguments against the rate increase and adopts none of those arguments "as worthy of even partial acceptance." *Id.* And it takes the Commission to task for "failure to alter its draft impact statement" in response to the comments of other agencies and parties to the proceeding having special environmental interests. *Id.* Such assertions show that the District Court has not confined itself to enforcing the "procedural" requirements of NEPA but has thrust itself directly into the substantive decision-making properly confided to the agency.

Whether a court may pass upon the merits of an agency's impact statement determinations and substitute its judgment about their proper resolution is an open and disputed question. Judge Friendly, rejecting such attacks upon an ICC impact statement in *City of New York* v. *United States,* 344 F. Supp. 929 (E.D.N.Y. 1972), strongly suggested that NEPA, in light of its language and legislative history, contemplated little, if any, judicial review of the substantive policy judgments embodied in the impact statement. Similarly, in *National Helium Corp.* v. *Morton,* 486 F.2d 995 (10th Cir. 1973), *cert. denied,* 42 U.S.L.W. 3632 (U.S. May 13, 1974), the Tenth Circuit held that review of an impact statement was limited to whether the agency made "an objective good faith effort to comply with the statutory procedural requirements" 486 F.2d at 1001. See also *Bradford Township* v. *Illinois State Toll Highway*

Authority, 463 F.2d 537 (7th Cir.), *cert. denied*, 409 U.S. 1047 (1972).[33]

Even if the courts are entitled to engage in substantive review of the merits of an impact statement, the District Court's action here could not be sustained. As its criticisms plainly show, the court engaged in *de novo* review and virtually substituted its own evaluation of the particular arguments and studies for those of the Commission. This approach could not be justified under any proper standard of judicial review.

As the courts have time and again emphasized, NEPA was simply intended to assure that the environmental effects of a proposed action are given adequate consideration by the decision maker, *e.g.*, *Cape Henry Bird Club* v. *Laird*, 359 F. Supp. 404 (W.D. Va.), *aff'd per curium*, 484 F.2d 453 (4th Cir. 1973); it was not intended to be a license for environmental groups or reviewing courts to substitute their judgment for that of the agency charged with the responsibility of evaluating the environmental impact of the action involved. By contrast the lower court's decision makes the validity of the agency's efforts depend on its ability to anticipate and refute every possible post hoc attack that can be leveled

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[33] To be sure, some opinions—most notably two opinions by the presiding judge below—take the view that these substantive determinations are open to review to a greater or lesser degree. See *Calvert Cliffs' Coordinating Committee* v. *AEC*, 449 F.2d 1109 (D.C. Cir. 1971); *SCRAP* v. *United States*, 371 F. Supp. 1291 (D.D.C. 1974). Indeed, Judge Breitenstein concurring in the Tenth Circuit's *National Helium* decision explicitly recognized the conflict between different circuits on the reviewability issue. 486 F.2d at 1006.

at it, rather than on an evaluation of its efforts construed in light of a rule of reason.[33]

Finally, even if the lower court did have some basis for overturning the ICC's impact statement, it certainly was not entitled to prescribe and dictate how the ICC should handle the case on remand. The decision patently usurps the agency's function by its detailed directions to the ICC specifying what arguments, evidence or procedures may or may not be utilized in the remanded proceeding.[34] Indeed, the court stops scarcely short of advising the ICC that it must reach a different result in the remanded proceeding.[35]

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[33] As one court has stated: "We are reminded of the suggestion of the district court in this case that '[i]t is doubtful that any agency, however objective, however sincere, however well-staffed, and however well-financed, could come up with a perfect environmental impact statement in connection with any major project. Further studies, evaluations and analyses by experts are almost certain to reveal inadequacies or deficiencies. But even such deficiencies and inadequacies, discovered after the fact, can be brought to the attention of the decision-makers, including, ultimately, the President and the Congress itself.' " *Environmental Defense Fund* v. *Corps of Engineers,* 470 F.2d 289, 297 (8th Cir. 1972), *cert. denied,* 412 U.S. 931 (1973). See also *Jicarilla Apache Tribe of Indians* v. *Morton,* 471 F.2d 1275, 1280, (9th Cir. 1973).

[34] The court advises the agency what types of analyses and studies it must make and include in its new impact statement (371 F. Supp. at 1302-03, 1306); it tells it what kind of arguments it may not ignore (*id.* at 1303-04); it determines the scope of the study including a direction to study in depth the underlying rate structure (*id.* at 1304-05); and it prescribes procedural steps that find no support whatever in NEPA itself (*id.* at 1306-07; see pp. 29-32, below).

[35] Quite apart from the tone of the decision, it appears to say specifically at two points that it is condemning the impact statement because it did not adopt at least some of the environmental arguments (371 F.Supp. at 1302) and some of the specific agency criticisms (*id.* at 1302-04).

The lower court's action in this regard not only confirms that it has substituted its own substantive views for those of the agency but represents independent legal error. It is a long established rule that the courts will not direct an administrative agency how to exercise the discretion reposed in it by Congress or dictate the content of the decision that the agency may make in the exercise of that discretion.[36] On judicial review the court's function is simply to lay bare any legal error committed by the agency (*FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952)), and it is improper for the reviewing court to impose in its remand limitations on the way in which the agency shall exercise its judgment. *Id.; Arrow Transp. Co.* v. *Cincinnati, N.O. & T.P. Ry.*, 379 U.S. 642 (1965).

Significant recurring issues are posed by the lower court's claim of authority to review the ICC's substantive determinations, by the standard of review applied by the court, and by the constraints applied to the ICC in the remanded proceeding. The issues are plainly of importance not only in defining the allocation of responsibility between court and agency under NEPA but also because of the practical consequences for the courts if they are to engage in the substantive review of the merits of the many environmental projects that are made the subject of impact statements each year.[37] It is thus of utmost importance that these issues be resolved as promptly as possible.

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[36] *United States ex rel. Chicago G. W. R.R.* v. *ICC*, 294 U.S. 50, 60 (1935); *ICC* v. *United States ex rel. Waste Merchants Ass'n*, 260 U.S. 32, 34 (1922); *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 317-18 (1958); *North Carolina Natural Gas Corp.* v. *United States*, 200 F.Supp. 745, 752 (D. Del. 1961).

[37] As of May 31, 1973, CEQ had received draft or final impact statements relating to 4,140 agency actions. 4th *CEQ Ann. Rep.* 242 (1973).

3. A substantial question is also raised by the District Court's determination that an impact statement must be prepared not only prior to the agency's *decision* in a general revenue proceeding but also prior to a hearing in the course of such proceeding even though no decision whatever is reached at the hearing stage. The lower court here relied on the ICC's failure to issue an impact statement prior to a "hearing" as a subsidiary "procedural" ground for invalidating the impact statement. 371 F.Supp. at 1300.[38] And it directed the ICC on remand to publish its impact statement prior to a "hearing" as well as prior to its ultimate decision. *Id.* at 1306-07.

The lower court's decision misconceives both the nature of a general revenue proceeding and the requirements of NEPA. General revenue proceedings are largely conducted through written testimony and all evidence is furnished directly to the full Commission itself. No tentative or recommended decision is made by an examiner or board at any intermediate stage: the ICC makes its own decision based upon the compiled evidence, briefs and oral argument.

Under the express language of NEPA the only environmental impact statement required is one that is to be "include[d]" in or with the agency's recommendation

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[38] The principal procedural point made by the court was that the ICC in preparing its impact statement did not "start over again" but merely reopened *Ex Parte No. 281* "for the limited purpose" of evaluating the environmental impact of the proposed increases through the impact statement procedure. *Id.* at 1299-1300. It is difficult to understand what the District Court finds objectionable on this score or how any prejudice can possibly have resulted from the ICC's action. Obviously, there was no reason for the ICC to revise its October 4 report unless and until its impact statement inquiry showed that the increases would have adverse environmental consequences.

or report. Section 102(2)(C). Since the same section provides that the impact statement shall "accompany" the proposal through the "agency review processes," it has been argued that the impact statement must be prepared at the first decision-making stage where two or more decisions are involved, so that it may inform that initial decision and be considered at subsequent stages of agency review. Here, however, the sole decision is that made by the full Commission and there is no basis whatever for requiring an impact statement at any earlier point.[39]

The lower court relied on two decisions which allegedly support the proposition that an impact statement must be prepared prior to any hearing that may be held in the course of an agency proceeding—the Second Circuit's decision in *Greene County* and Judge Wright's own decision in *Calvert Cliffs*.[40] The lower court overstates the holding of these cases in a highly significant way. Both of the decisions dealt with agency hearings which produced an examiner or hearing board report as an initial stage in the decision-making process (see 449 F.2d at 1118; 455 F.2d at 422); there was thus some arguable basis for their reliance upon Section 102(2)(C)'s requirement that the impact statement must "accompany the proposal through the

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[39] The agency must, of course, consult with and obtain comments from other federal agencies before making the impact statement. *Id.* One means of doing so, used by the ICC here, is to prepare a draft impact statement. But, again, there is no NEPA requirement that this be done at a specific point in time so long as it occurs before the final impact statement is issued.

[40] *Greene County Planning Board* v. *FPC*, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972); *Calvert Cliffs' Coordinating Committee* v. *AEC*, 449 F.2d 1109 (D.C. Cir. 1971).

existing agency review processes."[41] In a general revenue proceeding, however, hearings are not the forum for an "agency decision maker" (449 F.2d at 1114) nor do they culminate in "an initial decision." 455 F.2d at 422. The first and only *decision* is that of the Commission itself.[42]

The District Court not only engrafted a new and unsupported requirement onto the language of NEPA but it further complicated the ICC's already burdensome task. Virtually all commodities in the country are in issue in a general revenue proceeding which embraces literally thousands of individual rates. At present, even with expedited procedures and maximum use of written evidence and comments, the ICC often barely completes its single-stage proceeding within the seven-month suspension period.

The lower court, without any statutory sanction, would add an entirely new stage to the proceedings. It

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[41] See 449 F.2d at 1117; 455 F.2d at 421. For example, *Calvert Cliffs* stressed that the impact statement requirement focused upon "each agency decision maker" and that Congress intended the impact statement to be "considered" by the hearing board. 449 F.2d at 1114, 1118. *Greene County* summed up its decision by saying that an impact statement must be prepared before the examiner issued "his initial decision." 455 F.2d at 422.

[42] There are, of course, other important distinctions between the instant case and *Greene County* and *Calvert Cliffs*. Both of those cases involved serious procedural infirmities not present here. 455 F.2d at 421-22; 449 F.2d at 1117. In addition, each of them involved basic license-type grants; in the present case, by contrast, the ICC determinations do not resolve the justness and reasonableness of particular rates on particular movements, and any sufficiently interested party is entitled to file a complaint against such rates under Sections 8, 9, and 13 of the Act. In sum, neither the procedures employed nor the nature of the agency action resemble those at issue in the *Greene County* and *Calvert Cliffs* cases.

would require the ICC to assemble environmental information, to prepare a draft statement, to obtain comments upon it, and to prepare a revised impact statement before undertaking the quite similar fact-gathering process that it employs in reaching its decision on the merits. See 371 F. Supp. at 1306-07. No such unwieldy, pointless exercise can contribute either to the goals of NEPA or to the ICC's basic task of assuring a sound and efficient rail transportation system in the United States.[43]

CONCLUSION

For the reasons stated, the Court should note probable jurisdiction of the appeal.

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July 1974

[43] The observation made in Mr. Justice White's separate opinion in *SCRAP* bears repeating in this context. The "failure to maintain this country's railroads even in their present anemic condition will guarantee that recyclable materials will stay where they are—far beyond the reach of recycling plants that as a consequence may not be built at all." 412 U.S. at 724.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 971-72

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), ET AL.,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA

and

THE INTERSTATE COMMERCE COMMISSION, ET AL.,

Defendants.

Notice of Appeal to the Supreme Court of the United States

Notice is hereby given that The Aberdeen and Rockfish Railroad Company and the other carriers listed in the attachment to this notice, who are parties in the above-captioned action, hereby appeal to the Supreme Court of the United States from the order and decision of this Court entered February 19, 1974. This appeal is taken pursuant to 28 U.S.C. §§ 1253, 2101.

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April 19, 1974

Southern Railroads

Aberdeen and Rockfish Railroad Company
Alabama Great Southern Company, The
Albany and Northern Railroad Company
Alexander Railroad Company
Apalachicola Northern Railroad Company
Atlanta & Saint Andrews Bay Railway Company
Atlanta and West Point Rail Road Company
Atlantic and East Carolina Railway Company
Atlantic and Western Railway Company
Beauford and Morehead Railroad Company
(A.T. Leary, Lessee)
Birmingham Southern Railroad Company
Bonhomie and Hattiesburg Southern Railroad Company
Camp Lejeune Railroad Company
Cape Fear Railways, Incorporated
Carolina and Northwestern Railway Company
Carolina, Clinchfield and Ohio Railway
Carolina, Clinchfield and Ohio Railway of South Carolina
(Seaboard Coast Line Railroad Company and
Louisville and Nashville Railroad Company, Lessees)
Carrollton Railroad, The
Central of Georgia Railroad Company
Chattahoochee Industrial Railroad
Chattahoochee Valley Railroad Company
Cincinnati, New Orleans and Texas Pacific Railway
Company, The
Cliffside Railroad Company
Columbia, Newberry and Laurens Railroad Company
Columbus and Greenville Railway Company
Corinth and Counce Railroad Company, The
Durham and Southern Railway Company
East Tennessee and Western North Carolina Railroad
Company
Edgmoor and Manetta Railway Company
Fernwood, Columbia & Gulf Railroad Company
Florida East Coast Railway Company

Fort Myers Southern Railroad Company
Gainesville Midland Railroad Company
Georgia, Ashburn, Sylvester & Camilla Railway Company
Georgia Northern Railway Company, The
Georgia Rail Road & Banking Company
(Operated as the Georgia Railroad by Lessees:
Seaboard Coast Line Railroad Company and
Louisville and Nashville Railroad Company)
Georgia Southern and Florida Railway Company
Graham County Railroad Company
Greenville and Northern Railway Company
Gulf, Mobile and Ohio Railroad Company
Gulf Transport Company
Hampton & Branchville Railroad Company
High Point, Thomasville & Denton Railroad Company
Hartford and Slocomb Railroad Company
Hartwell Railway Company
Illinois Central Railroad Company
Interstate Railroad Company
Kansas City Southern Railway Company, The
Kentucky and Tennesse Railway
Lancaster and Chester Railway Company
Laurinburg and Southern Railroad Company
Lawndale Transportation Company
Live Oak, Perry & South Georgia Railway Company
Louisiana Southern Railway Company
Louisville and Wadley Railway Company
Marianna & Blountstown Railroad Company, The
Meridian & Bigbee Railroad Company
Milstead Railroad Company
Mississippi & Skuna Valley Railroad Company
Mississippian Railway
Mississippi Export Railroad Company
Mobile & Gulf Railroad Company, The
New Orleans & Lower Coast Railroad Company
New Orleans Terminal Company
Norfolk Southern Railway Company
Paducah & Illinois Railroad Company

Pearl River Valley Railroad Company
Pickens Railroad Company
Port Bienville Railroad
Port Utilities Commission of Charleston S.C., The
Sandersville Railroad Company
Savannah State Docks Railroad Company
Seaboard Coast Line Railroad Company
Southern Railway Company
South Georgia Railway Company, The
State University Railroad Company
Sumter & Choctaw Railway Company
St. Louis-San Francisco Railway Company
St. Mary's Railroad Company
Tampa Southern Railroad Company
Tennessee, Alabama & Georgia Railway Company
Tennessee Railroad Company
(Samuel Spencer and Tom J. Gentry, Receivers)
Terminal Railway Alabama State Docks
Valdosta Southern Railroad Company
Ware Shoals Railroad Company
Warrenton Rail Road Company
Western Railway of Alabama, The
Winston-Salem Southbound Railway Company
Yancey Railroad Company

EASTERN RAILROADS

Akron & Barberton Belt Railroad Company, The
Akron, Canton & Youngstown Railroad Company, The
Algers, Winslow and Western Railway Company
Aliquippa and Southern Railroad Company
Alton & Southern Railway Company
Ann Arbor Railroad Company, The
Arcade and Attica Railroad Corporation
Aroostook Valley Company
Baltimore and Annapolis Railroad Company, The
Baltimore and Eastern Railroad Company
Baltimore and Ohio Chicago Terminal Railroad Company, The

Baltimore and Ohio Railroad Company, The
Bangor and Aroostook Railroad Company
Bath and Hammondsport Railroad Company
Beech Mountain Railroad Company
Belfast and Moosehead Lake Railroad Company
Bellefonte Central Railroad Company
Belt Railway Company of Chicago, The
Bessemer and Lake Erie Railroad Company
Black River & Western Corporation
Boston and Maine Corporation
(Charles W. Bartlett, Paul W. Cherington and Robert W. Meserve, Trustees)
Boyne City Railroad Company
Brooklyn Eastern District Terminal
Buffalo Creek Railroad
(Erie Lackawanna Railway and Lehigh Valley Railroad Company, Lessees)
Bush Terminal Railroad Company
Cadillac & Lake City Railway Company
Cadiz Railroad Company
Cambria and Indiana Railroad Company
Canadian Pacific Limited on Behalf of Canadian Pacific Lines in Maine
Canadian Pacific Limited on Behalf of Canadian Pacific Lines in Vermont
Canton Railroad Company
Central Indiana Railway Company
Central Railroad Company of New Jersey, The
(R.D. Timpany, Trustee)
Central Vermont Railway, Inc.
Chesapeake and Ohio Railway Company, The
Chesapeake Western Railway
Chestnut Ridge Railway Company
Chicago & Eastern Illinois Railroad Company
Chicago & Illinois Midland Railway Company
Chicago & Illinois Western Railroad
Chicago and Western Indiana Railroad Company

Chicago Heights Terminal Transfer Railroad Company
Chicago River and Indiana Railroad Company, The
Chicago South Shore and South Bend Railroad
Chicago, West Pullman & Southern Railroad Company
Claremont & Concord Railway Company, Inc.
Clarendon and Pittsford Railroad Company, The
Conemaugh & Black Lick Railroad Company
Cooperstown and Charlotte Valley Railway Corp., The
Coudersport and Port Allegany Railroad Company
Curtis Bay Railroad Company
Cuyahoga Valley Railway Company, The
Dansville and Mount Morris Railroad Company, The
Delaware and Hudson Railway Company
Delray Connecting Railroad Company
Detroit and Mackinac Railway Company
Detroit and Toledo Shore Line Railroad Company, The
Detroit Terminal Railroad Company
Detroit, Toledo and Ironton Railroad Company
East Erie Commercial Railroad
East Jersey Railroad and Terminal Company
East St. Louis Junction Railroad Company
East Washington Railway Company
Elgin, Joliet and Eastern Railway Company
Erie Lackawanna Railway Company
Everett Railroad Company, The
Fairport, Painesville and Eastern Railway Company
Ferdinand Railroad Company
Fonda, Johnstown and Gloversville Railroad Company
Fore River Railroad Corporation
Frankfort & Cincinnati Railroad Company
Genesee and Wyoming Railroad Company
Grafton and Upton Railroad Company
Grand Trunk Railway System
(Lines in the United States East of the West Bank of the Detroit and St. Clair Rivers), comprising the following carrier:
Canadian National Railway Company

Grand Trunk Western Railway Company
Green Mountain Railroad Corporation
Greenwich & Johnsonville Railway Company
Hoboken Shore Railroad
Hoosac Tunnel and Wilmington Railroad Company
Illinois Northern Railway
Illinois Terminal Railroad Company
Indiana Harbor Belt Railroad Company
Indianapolis Union Railway Company
Ironton Railroad Company, The
(Lehigh Valley Railroad Company and
Reading Company, Lessees)
Johnstown and Stony Creek Rail Road Company
Kanawha Central Railway Company, The
Kelley's Creek and Northwestern Railroad Company
Kentucky & Indiana Terminal Railroad Company
Lackawanna and Wyoming Valley Railway Company
Lake Erie and Eastern Railroad
Lake Erie and Ft. Wayne Railroad
Lake Erie, Franklin & Clarion Railroad Company
Lakefront Dock and Railroad Terminal Company, The
Lake Terminal Railroad Company, The
Lehigh and Hudson River Railway Company, The
Lehigh and New England Railway Company
Lehigh Valley Railroad Company
(R. C. Haldeman and John F. Nash, Trustees)
Livonia, Avon & Lakeville Railroad Corporation
Lorain & West Virginia Railway Company, The
Louisville and Nashville Railroad Company
Lowville and Beaver River Railroad Company, The
Ludington & Northern Railway
Maine Central Railroad Company
Manufacturers' Junction Railway Company
Manufacturers Railway Company
Maryland and Pennsylvania Railroad Company
Massena Terminal Railroad Company, The
McKeesport Connecting Railroad Company

Middle Fork Railroad Company
Middletown and New Jersey Railway Company, Inc.
Midway Railroad Company
Monongahela Connecting Railroad Company, The
Monongahela Railway Company, The
Montour Railroad Company
Montpelier & Barre Railroad Company
Morehead and North Fork Railroad Company
Morristown & Erie Railroad Company
Moshassuck Valley Railroad Company
Mount Hope Mineral Railroad Company
Narragansett Pier Railroad Company, Inc., The
Napierville Junction Railway Company
Newburgh and South Shore Railway Company, The
New Hope & Ivyland Railroad Company
New Jersey, Indiana & Illinois Railroad Company
New York and Long Branch Railroad Company, The
New York Connecting Rail Road Company, The
New York Dock Railway
New York, Susquehanna and Western Railroad Company
Niagara Junction Railway
Norfolk & Portsmouth Belt Line Railroad
Norfolk and Western Railway Company
Norfolk, Franklin and Danville Railway Company
Northampton and Bath Railroad Company
Norwood & St. Lawrence Railroad Company
Ogdensburg Bridge and Port Authority
Patapsco & Back Rivers Railroad Company
Pennsylvania and Atlantic Railroad Company (Note)
(Note.—South of Highstown, N.J. to Pemberton, N.J. (Inc.)) (The Union Transportation Company, Lessee)
Penn Central Transportation Company
(George P. Baker, Richard C. Bond, Jervis Langdon, Jr., and Willard Wirtz, Trustees)
Pennsylvania-Reading Seashore Lines
Peoria and Pekin Union Railway Company

Philadelphia, Bethlehem and New England Railroad Company
Pioneer and Fayette Railroad Company, The
Pittsburgh & Shawmut Railroad Company, The
Pittsburgh, Allegheny & McKees Rocks Railroad Company
Pittsburgh and Lake Erie Railroad Company, The
Pittsburgh and Ohio Valley Railway Company
Pittsburgh, Chartiers & Youghiogheny Railway Company
Port Huron and Detroit Railroad Company
Port Jersey Railroad Company
Portland Terminal Company
Providence and Worcester Railroad Co.
Quebec Central Railway Company
Rahway Valley Railway Company
(Rahway Valley Company, Lessee)
Raritan River Rail Road Company
Reading Company
Richmond, Fredericksburg and Potomac Railroad Company
River Terminal Railway, The
Rosslyn Connecting Railroad Company
St. Johnsbury & Lamoille County Railroad
Skaneateles Short Line Railroad Corporation
South Brooklyn Railway Company
South Buffalo Railway Company
Southern Indiana Railway, Inc.
Springfield Terminal Railway Company (Vermont)
Staten Island Rapid Transit Railway Company, The
Steelton & Highspire Railroad Company
Stewartstown Railroad Company, The
Strasburg Rail Road Company
Strouds Creek and Muddlety Railroad
Terminal Railroad Association of St. Louis
Toledo, Angola & Western Railway Company, The
Toledo, Peoria & Western Railroad Company
Toledo Terminal Railroad Company, The

Western Railroads

Abilene & Southern Railway Company
Angelina & Neches River Railroad Company
Apache Railway Company, The
Arcata and Mad River Rail Road Company, The
Arkansas & Louisiana Missouri Railway Company
Arkansas Western Railway Company, The
Ashley, Drew & Northern Railway Company
Atchison, Topeka and Santa Fe Railway Company, The
Bauxite & Northern Railway Company
Beaver, Meade and Englewood Railroad Company
Belton Railroad Company
Bevier & Southern Railroad Company
British Columbia Hydro & Power Authority
Burlington Northern Inc.
Butte, Anaconda & Pacific Railway Company
California Western Railroad
Camas Prairies Railroad Company
Camino, Placerville & Lake Tahoe Railroad Company
Canadian National Railways
Canadian Pacific Limited
Carbon County Railway Company
Cedar Rapids and Iowa City Railway Company
Central California Traction Company
Chicago and North Western Railway Company
Chicago, Milwaukee, St. Paul and Pacific Railroad Company
Chicago, Rock Island and Pacific Railroad Company
Chicago Short Line Railway Company
City of Prineville Railway
Colorado and Southern Railway Company, The
Colorado & Wyoming Railway Company, The
Columbia & Cowlitz Railway Company
Condon, Kinzua & Southern Railroad Company
Dardanelle & Russellville Railroad Company
Delta Valley and Southern Railway Company
Denver and Rio Grande Western Railroad Company, The

DeQueen and Eastern Railroad Company
Des Moines and Central Iowa Railway Company
Doniphan, Kensett & Searcy Railway
Duluth & Northeastern Railroad Company
Duluth, Missabe and Iron Range Railway Company
Escanaba and Lake Superior Railroad Company
Fort Smith and Van Buren Railway Company
Fort Worth and Denver Railway Company
Georgetown Railroad Company
Graysonia, Nashville & Ashdown Railroad Company
Great Southwest Railroad, Inc.
Green Bay and Western Railroad Company
Gulf, Mobile and Ohio Railroad Company
Hollis & Eastern Railroad Company
Holton Inter-Urban Railway Company
Hutchinson and Northern Railway Company, The
Illinois Central Railroad Company
Iowa Terminal Railroad Company
Klamath Northern Railway Company
Kansas City Public Service Freight Operation
Kansas City Southern Railway Company, The
Kansas, Oklahoma & Gulf Railway Company
Kewaunee, Green Bay and Western Railroad Company
Lake Superior & Ishpeming Railroad Company
Laona & Northern Railway Company
LaSalle and Bureau County Railroad Company, The
Longview, Portland & Northern Railway Company
Louisiana & Arkansas Railway Company
Louisiana and North West Railroad Company, The
Louisiana & Pine Bluff Railway Company, The
Louisiana Eastern Railroad (Intrastate only)
Marinette, Tomahawk & Western Railroad Company
McCloud River Railroad Company
Minneapolis, Anoka and Cuyana Range Railroad Company
Minneapolis Industrial Railway Company
Minneapolis, Northfield and Southern Railway
Minnesota, Dakota & Western Railway Company

Missouri Illinois Railroad Company
Missouri-Kansas-Texas Railroad Company
Missouri Pacific Railroad Company
Modesto and Empire Traction Company
Montana Western Railway, The
Moscow, Camden & San Augustine Railroad
Nevada Northern Railway Company
North Louisiana & Gulf Railroad Company
Omaha, Lincoln and Beatrice Railway Company
Oregon & Northwestern Railroad Company
Oregon, California & Eastern Railway Company
Oregon Electric Railway Company
Oregon Pacific & Eastern Railway
Oregon Trunk Railway
Pacific Coast R. R. Company
Pacific Great Eastern Railway Company
Pecos Valley Southern Railway Company, The
Petaluma and Santa Rosa Railroad Company
Point Comfort & Northern Railway Company
Portland Traction Company
(Portland Railroad and Terminal Division)
Port of Tillamook Bay Railroad
Port Townsend Railroad
Prescott and Northwestern Railroad Company, The
Reader Railroad
Rockdale, Sandow & Southern Railroad Company
Roscoe, Snyder and Pacific Railway Company
Sabine River & Northern Railroad Company
Sacramento Northern Railway
St. Louis Southwestern Railway Company
Salt Lake, Garfield and Western Railway Company
San Diego & Arizona Eastern Railway Company
Sand Springs Railway Company
San Francisco State Belt Railroad
San Luis Central Railroad Company, The
Santa Maria Valley Railroad Company
Sierra Railroad Company

Soo Line Railroad Company
Southern Industrial Railroad, Inc.
Southern Pacific Transportation Company
Southern San Luis Valley Railroad Company
Spokane International Railroad Company
Spokane, Portland and Seattle Railway Company
Stockton Terminal and Eastern Railroad
Sunset Railway
Tacoma Municipal Belt Line Railway
Texas & Northern Railway Company
Texas Central Railroad Company
Texas, Oklahoma & Eastern Railroad Company
Texas and Pacific Railway Company, The
Texas Mexican Railway Company, The
Texas-New Mexico Railway Company
Texas South-Eastern Railroad Company
Tidewater Southern Railway Company
Tooele Valley Railway Company
Trona Railway Company
Tucson, Cornelia and Gila Bend Railroad Company
Tulsa-Sapulpa Union Railway Company
Union Freight Railroad Company
Union Pacific Railroad Company
Valley & Siletz Railroad Company
Ventura County Railway Company
Visalia Electric Railroad Company
Walla Walla Valley Railway Company
Warren & Saline River Railroad Company
Washington, Idaho & Montana Railway
Waterloo Railroad Company
Weatherford, Mineral Wells and Northwestern Railway Company, The
Western Pacific Railroad Company, The
Yakima Valley Transportation Company
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In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court (App. A, *infra*) is reported at 371 F. Supp. 1291. The Interstate Commerce Commission's opinion and order of October 4, 1972, Ex Parte 281, *Increased Freight Rates and Charges, 1972* (App. D, *infra*),[1] is reported at 341

[1] In reprinting this order in Appendix D, we have omitted the lengthy, detailed discussion of commodity groups not

I.C.C. 290. Its order of May 2, 1973 (App. E, *infra*) is not reported.

JURISDICTION

The judgment of the three-judge district court was entered on February 19, 1974. Notices of Appeal to this Court were filed by the Interstate Commerce Commission and the United States on April 19, 1974 (App. C, *infra*). On June 13, 1974, Mr. Chief Justice Burger extended the time for docketing the appeal to and including July 2, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1253 and 2101(b). *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742.

QUESTIONS PRESENTED

1. Whether the court below, in prohibiting the Interstate Commerce Commission from approving a general railroad rate increase without first conducting a thorough analysis of the underlying rate structure in an environmental impact statement, improperly interfered with the Commission's discretion to determine the appropriate type of proceeding in which to address complex questions relating to rate-making.

2. Whether NEPA requires that a new hearing be conducted to consider an environmental impact state-

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involved in this proceeding, and Appendices containing financial data and future evidentiary requirements. We are lodging ten copies of the entire order with the Clerk for distribution to the Court.

ment, where the sole agency decision makers conducted a hearing and considered environmental issues before reaching their decision.

STATUTES INVOLVED

Section 15(7) of the Interstate Commerce Act, 24 Stat. 384, as amended, 49 U.S.C. 15(7), provides:

> Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commis-

sion may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Section 102 of the National Environmental Policy Act of 1969, 83 Stat. 853, 42 U.S.C. 4332, provides in relevant part:

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

* * * * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local

agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

* * * *

STATEMENT

This appeal is a further chapter in a long and complex litigation involving the impact of the National Environmental Policy Act of 1969, 42 U.S.C. 4332 (NEPA), on a general revenue proceeding of the Interstate Commerce Commission conducted pursuant to Section 15(7) of the Interstate Commerce Act, as amended, 49 U.S.C. 15(7).[2]

Faced with sharply escalating costs and an increasingly precarious financial condition, the Nation's railroads in December 1971 collectively petitioned the Commission for authorization to file a temporary 2.5 percent surcharge on nearly all freight rates. This emergency interim measure was intended to redress the railroads' financial condition pending the railroads' filing of proposed permanent selective rate increases.

The Commission, finding the railroads to have a critical need for additional revenues, concluded that the surcharge should be permitted to take immediate effect. The railroads then filed proposed selective

[2] See *United States* v. *S.C.R.A.P.*, 412 U.S. 669; *United States* v. *S.C.R.A.P.*, 414 U.S. 1035.

permanent increases averaging 4.1 percent. On April 24, 1972, the Commission issued an order pursuant to Section 15(7) of the Interstate Commerce Act, instituting an investigation into the lawfulness of the permanent rate increases and suspending the permanent increases for seven months, the maximum period permitted by 49 U.S.C. 15(7).[3]

Thereafter, a group of law students—Students Challenging Regulatory Agency Procedures (S.C.R.A.P.)—and other environmental groups filed suit alleging that a detailed statement on the environmental impact of the proposed action was required by Section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. 4332(2)(C). Plaintiffs sought an injunction both to prevent the railroads from collecting the 2.5 percent surcharge, and to compel the Commission to suspend its order authorizing the surcharge to become effective without suspension.

The district court granted the relief sought. *S.C.R.A.P.* v. *United States*, 346 F. Supp. 189, 201 (D. D.C.). On appeal, however, this Court reversed, holding that under Section 15(7) of the Interstate Commerce Act the Commission has exclusive power to suspend rates pending final decision on their lawfulness, and that "NEPA was not intended to repeal by implication any other statute." *United States* v. *S.C.R.A.P.*, 412 U.S. 669, 694.

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[3] Since the suspended permanent tariffs were intended to supplant the temporary surcharge, the Commission authorized the railroads to continue to collect the 2.5 percent surcharge until November 30, 1972—the end of the suspension period on the selective increases.

Before this Court rendered its opinion, the Commission, on September 27, 1972, issued a final report and order authorizing some of the selective permanent increases sought by the railroads. *Ex parte* 281, *Increased Freight Rates and Charges, 1972*, 341 I.C.C. 290 (App. D, *infra*).[4]

In its opinion, the Commission considered the environmental impact of its authorization of the rate increases, both in general (App. D, *infra*, pp. 20d-35d), and as applied to specific commodities moving in the recycling process (App. D, *infra*, at pp. 49d-85d).[5] After this "extensive consideration" (*United States* v. *S.C.R.A.P.*, *supra*, 412 U.S. at 683, n. 11), the Commission made the threshold assessment that "increases at the levels authorized herein will have no significant adverse impact on the quality of our human environment" (App. D, *infra*, at p. 34d). Therefore, it found that a formal environmental impact statement was unnecessary. Nevertheless, the Commission delayed the effectiveness of the increases authorized for commodities moving in the recycling process for 25 days, to permit the filing of comments concerning the environmental impact of the increased rates on these commodities (App. D, *infra*, p. 35d).

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[4] The authorized rates for several of the recyclable materials were less than those sought by the railroads. (See App. D, *infra*, pp. 85d-86d).

[5] This consideration was based on independent study by the Commission, as well as the draft impact statement previously filed by the railroads requesting the increases and comments of shippers and environmental groups (App. D, *infra*, pp. 21d-23d).

Several such comments were filed, and, on November 7, 1972, the Commission reopened the proceeding to reconsider the environmental effects of the rates on commodities being transported for recycling, and suspended the tariffs on such commodities for another seven months. See *United States* v. *S.C.R.A.P.*, *supra*, 412 U.S. at 683, n. 11.

Although not conceding that an impact statement was necessary, the Commission issued its draft impact statement on March 5, 1973, for public comment. After consideration of comments, the Commission adopted the final impact statement, again concluding that the selective tariff increases on commodities moving in the recycling process would not adversely affect the environment (346 I.C.C. 88).* It therefore found it unnecessary to reconsider the general revenue order of October 4, 1972, and terminated the proceeding (App. E, *infra*, p. 1e).

S.C.R.A.P., the other environmental groups, and certain scrap dealer associations thereupon filed this suit, seeking to vacate the Commission's orders permitting increased rates on recyclable materials on

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* We are lodging ten copies of this statement with the Clerk for distribution to the Court. It contains a thorough discussion of general environmental considerations (95-136, 235-236); a detailed discussion of the possible diversion from rail to truck caused by increased rates (*id.* at 136-143); and an extensive commodity-by-commodity analysis of the effect that the proposed increases will have on the shipping and use of recyclable materials (*id.* at 143-216). The Commission also discussed the various possible alternatives to rate increases on recyclable commodities. (*id.* at 218-235).

the ground that the Commission had failed to comply with NEPA.[7] The three-judge district court concluded, with Judge Flannery dissenting, that "not only the Commission's preparation and utilization of its impact statement but also the contents of that statement fail to comport with the obligations imposed on the Commission by Section 102(2)(C) [of NEPA]" (App. A, *infra*, p. 39a). It vacated the Commission's orders of October 4, 1972 and May 2, 1973, insofar as they related to commodities being shipped for recycling, and remanded for reconsideration of the rate increases applicable to such commodities.[8]

The district court's decision was purportedly based, not on substantive review of the Commission's orders, but on the court's conclusion that the Commission had failed to comply with the procedural requirements of NEPA. There were, in the court's view, two major procedural defects. The court held the statement's

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[7] They also sought an injunction restraining the railroads from collecting the increased rates on such materials. The district court originally granted this injunction; it was stayed by the Chief Justice, and then vacated by this Court, which remanded the case for reconsideration in light of *Atchison, Topeka, & Santa Fe R. Co.* v. *Wichita Board of Trade*, 412 U.S. 800. *United States* v. *S.C.R.A.P.*, 414 U.S. 1035.

[8] The court refused to enjoin the collection of the higher rates by the railroads, noting that "The only consequence of our vacating the Commission's orders pending reconsideration of the rate increases 'is that the railroads may not rely, in some subsequent proceeding, on a Commission finding that the proposed rates were just and reasonable. * * *' Atchison, Topeka & Santa Fe R. Co. v. Wichita Board of Trade, *supra*" (App. A, *infra*, p. 44a, n. 50).

fundamental defect to be that it limited its "analysis to the marginal impact of the most recent rate increase with no discussion of whether the underlying rate structure itself significantly affects the environment" (App. A, *infra*, at p. 34a). In addition, it held that the Commission was required to hold a hearing after the development of the impact statement, to provide a basis for a "thorough reconsideration" by the Commission "of the proposed recyclable rate increase in light of that hearing and the impact statement" (*id.* at p. 28a).

The court remanded the case to the Commission, directing it to prepare a new draft impact statement containing a thorough-going rate structure study on the relationship of recyclables to virgin materials (App. A, *infra*, pp. 39a-40a). The court also directed the Commission to conduct an analysis of the effects of the rate structure on investment in manufacturing facilities which make intensive use of scrap (*id.* at p. 40a). Furthermore, the district court found a "strong presumption" that "full consideration of the revised impact statement through 'existing agency review processes' must entail oral hearings before the Commission" (*id.* at pp. 42a-43a).

THE QUESTIONS ARE SUBSTANTIAL

This case presents important questions concerning the effect of NEPA on agencies with rate-making responsibilities and, more generally, on the discretion of agencies to determine the manner in which to make decisions. In determining that the Commis-

sion's environmental consideration was inadequate because it did not analyze in detail the underlying rate structure, but focused instead on the rate increases which were involved in the revenue proceeding, the court intruded into the area traditionally reserved to agency discretion. NEPA was not intended to limit a rate-making agency's authority to determine the appropriate type of proceeding in which to make its decisions. Nor was the provision in Section 102(2)(C) that the impact statement "shall accompany the proposal through the existing agency review processes" designed to require an agency to conduct a new hearing in the circumstances of this case.

1. The Commission's Consideration of Environmental Factors Was Adequate.

The Commission orders involved here grew out of a general revenue proceeding, initiated by the railroads' proposal to increase all their rates and charges by about 4 percent. In general revenue proceedings, the Commission determines whether the carriers' total revenues are sufficient to provide the Nation with adequate transportation. If the carriers demonstrate that the general revenue increase is needed and the Commission determines that it is consistent with the public interest, the Commission will authorize a permissive revenue increase. In such proceedings, the Commission does not determine the reasonableness of individual rates, nor does it consider the relationship of rates for different classes of commodities. Instead, the Commission makes broad find-

ings balancing the railroads' need for revenue and the public interest. On the basis of these findings, it may allow the carriers to file tariffs embodying percentage increases.[9]

The Commission's decision, however, does not automatically increase any individual rate. If the railroad does decide to amend its tariffs, the Commission's determination means, instead, that a shipper challenging any individual rate increase which is within the percentage increase authorized in the general revenue proceeding must establish that the rate is unreasonable. The effect of the general revenue order is thus simply to shift the burden of proof concerning the reasonableness of individual rates that comply with the order from the carrier to the shipper.

General revenue orders are in the nature of emergency relief to enable the railroads to keep up, to some extent, with inflationary pressures, and thus to protect the public interest in adequate rail service.[10] Therefore, the Commission may suspend the effec-

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[9] Commission orders in general revenue proceedings have traditionally not been subject to judicial review. See, *e.g.*, *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487 (E.D. Va.); *Alabama Power Co.* v. *United States*, 316 F. Supp. 337 (D. D.C.), affirmed *per curiam* by an equally divided court *sub nom. Atlantic City Electric Co.* v. *United States*, 400 U.S. 73. Cf. *Atchison, Topeka, & Santa Fe R. Co.* v. *Wichita Board of Trade, supra*, 412 U.S. at 814, n. 10.

[10] The precarious financial state of the nation's railroads, particularly in the northeast, is documented in the Commission's October order (App. D, *infra*, pp. 3d-20d). The Regional Rail Reorganization Act of 1973, 87 Stat. 985, reflects similar concerns.

tiveness of the increases proposed by the railroads for only seven months. If the Commission study is not completed within that time, the rates go into effect without Commission authorization. 49 U.S.C. 15(7); see *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U.S. 658.[11] NEPA has not altered this statutory scheme. *United States* v. *S.C.R.A.P.*, 412 U.S. 669.

The decision of the court below would, as a practical matter, deny the railroads the benefit of timely general revenue orders. If such an order cannot issue without an environmental impact statement which analyzes not only the effects of the general revenue increases under consideration, but also the basic rate structure upon which they are predicated, no such order could be issued by the Commission within the statutory seven months. Indeed, the Commission is well aware of the need for a thorough study of the basic railroad freight rate structure, and is in fact now conducting such a study in a different proceeding, Ex Parte No. 270, *Investigation of the Rail Freight Structure*. That study includes, as a separate proceeding (Sub. No. 5), a study of the rate structure on iron and steel scrap, the principal commodity at issue here. But such studies cannot be made within the statutory time frame re-

[11] If the Commission has not acted within the suspension period, the Commission may require the carriers to keep detailed accounts and to repay any increases the Commission ultimately disallows. 49 U.S.C. 15(7); *United States* v. *S.C.R.A.P.*, *supra*, 412 U.S. at 697.

quired for general revenue orders. Environmental Impact Statement, p. 227.[12]

In sum, the district court's insistence that the Commission must, in effect, undertake comprehensive rate structure analyses and adjustments before it can authorize general revenue relief both misconceives the nature of general revenue proceedings and casts grave doubt on the Commission's ability effectively to respond to the carriers' revenue needs and public interest considerations within the statutorily limited suspension period. As this court noted in reviewing another district court's attempt to require the Commission to resolve complex rate-related questions in an inappropriate proceeding (*American Lines* v. *L. & N. R. Co.*, 392 U.S. 571, 592):

> Given the fact that * * * the Commission was to exercise its informed judgment in ultimately determining what method of costing was preferable, it is clear that the District Court also erred in refusing to permit the Commission to exercise that judgment in a proceeding it reasonably believed would provide the most adequate record

[12] The district court's opinion clearly contemplates that extensive studies of this nature will be conducted in order to prepare the impact statement. It suggests that the Commission may wish to "place a moratorium on rate increases on recyclable commodities until Ex Parte No. 270 is completed" (App. A, *infra*, pp. 37a-38a)—an alternative expressly rejected by the Commission (Impact Statement, p. 230). Moreover, the rather substantial discussion of the rate structure now contained in the impact statement was considered insufficient. See Impact Statement at pp. 102-133, 146-160, 222-228, and *passim*.

for the resolution of the problems involved. We can see no justification for denying the Commission reasonable latitude to decide where it will resolve these complex issues, in addition to how it will resolve them. The action by the District Court here not only deprives the Commission of the opportunity to make the initial resolution of the issues but also prevents it from doing so in a more suitable context.

This Court has just recently held that the Federal Power Commission had the authority to fix rates on an area-wide basis rather than on an individual producer basis and that, in order to make such a procedure feasible, it had statutory authority to impose a moratorium upon rate increases by producers for a period of 2½ years after the setting of the area rate. *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968). The basis for this holding was the principle that the "legislative discretion implied in the rate making power necessarily extends to the entire legislative process, embracing the method used in reaching the legislative determination as well as that determination itself." *Id.*, at 776. That principle is equally applicable to rate regulation carried out by the ICC, especially where, as here, the determination made on an interim basis is in general accord with both the legislative history of the statute involved and the results in prior cases decided by the agency.

Cf. *Wichita Board of Trade, supra*, 412 U.S. at 819-821.

The fact that this case, unlike *American Lines*, involves the application of NEPA does not justify

the district court's action. The purpose of NEPA is to ensure that the administrative decision maker gives full consideration to the environmental aspects of its decision. So long as the decision maker has taken the "hard look" at environmental consequences mandated by Congress, courts should not interject themselves into "the area of discretion of the [agency] as to the choice of the action to be taken." *Natural Resources Defense Council, Inc.* v. *Morton*, 458 F. 2d 827, 838 (C.A.D.C.). As this Court held in *United States* v. *S.C.R.A.P.*, *supra*, 412 U.S. at 697, NEPA does not give reviewing courts license to upset the "careful accommodation of the various interests involved" in Section 15(7) of the Interstate Commerce Act.[13]

The district court specifically disavowed any intent to review the merits of the Commission's environmental decision, and based its action instead on a holding that the Commission had failed to comply with the procedural requirements of NEPA (App.

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[13] In a somewhat similar situation, two courts of appeals have recently concluded that the Atomic Energy Commission did not violate NEPA when it issued reactor licenses after considering environmental impact statements which were based on interim safety criteria. The courts held that the agency could develop definitive criteria in a separate rulemaking proceeding without suspending all licensing in the interim. *Ecology Action* v. *United States Atomic Energy Commission*, 492 F.2d 998, 1002 (C.A. 2); *Union of Concerned Scientists* v. *Atomic Energy Commission*, C.A.D.C. No. 73-1099, decided June 10, 1974, slip op. 24-30.

A, *infra*, p. 22a).[14] It thus did not explicitly reach the question of the proper scope of judicial review of the merits of agency determinations under NEPA. Nevertheless, in concluding that the detailed impact statement here involved was inadequate, the court substituted its judgment for that of the agency concerning the matters discussed in the impact statement, and found that the arguments of the environmental interests, principally concerning the underlying rate structure, were not adequately rebutted for purposes of the issuance of a general revenue order (App. A, *infra*, pp. 30a-34a). Regardless of the particular formulations of the proper scope of judicial review of the merits of agency NEPA decisions, it is clear that such substitution of judicial for agency judgment is improper. See, *e.g.*, *Jicarilla Apache Tribe of Indians* v. *Morton*, 471 F.2d 1275 (C.A. 9); *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, 463 F.2d 783 (C.A.D.C.); *Upper Pecos Ass'n* v. *Stans*, 452 F.2d 783 (1233 (C.A. 10). And it is especially unwarranted where, as here, it would force the agency to use a particular type of proceeding for purposes for which it is not suited under the agency's regulatory scheme.

2. NEPA Does Not Require the Commission to Conduct a New Hearing to Consider the Impact Statement.

The district court concluded that, since Section 102 (2)(C) of NEPA provides that the agency environ-

[14] The court thus implicitly rejected the Commission's express determination that an impact statement was not necessary.

mental impact statement "shall accompany the proposal through the existing agency review processes," it was improper for the Commission to consider the formal impact statement without conducting a new hearing, and that there is "at least * * * a strong presumption * * * that full consideration of the revised impact statement through 'existing agency review processes' must entail oral hearings before the Commission" (App. A, *infra*, at pp. 42a-43a). But oral hearings before the Commission are not required in rulemaking proceedings of the kind involved here. See *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 756-758; *United States* v. *Florida East Coast Railway Co.*, 410 U.S. 224, 236-238. And NEPA does not change that aspect of the Commission's procedures. *United States* v. *S.C.R.A.P.*, *supra*, 412 U.S. at 694. There is, therefore, no legal basis for the court's "presumption."

The court relied for its conclusion upon *Calvert Cliffs' Coordinating Committee* v. *United States Atomic Energy Commission*, 449 F.2d 1109 (C.A. D.C.), and *Greene County Planning Board* v. *Federal Power Commission*, 455 F.2d 412 (C.A. 2), certiorari denied, 409 U.S. 849. Those cases dealt with fundamentally different types of agency proceedings, in which initial agency decisions were subject to review within the agency. They hold only that in those circumstances Section 102(2)(C) requires the impact statement to be considered at each level of agency review.[15] In contrast, here the initial agency decision

[15] In *Harlem Valley Transportation Association and Natural Resources Defense Council, Inc.* v. *Stafford*, C.A. 2, No. 73-2496, decided June 18, 1974, the court held that *Greene County*,

on general revenue matters is by the Commission itself; no intermediate agency decision makers are involved, nor are there here any agency review procedures. Instead, the Commission simply reconsidered its order of October 4, 1972, in light of the environmental impact statement, and concluded that the further study of the environmental effects of the rate increases showed no reason to revise the conclusions it there reached. Cf. *Life of the Land* v. *Brinegar*, 485 F.2d 460 (C.A. 9).[16]

In the absence of any "existing agency review processes", therefore, there was no violation of Section 102(2)(C), which does not in terms require a hearing to be conducted. Nor was there any inconsistency here with the policy of NEPA, since the agency decision makers have taken the necessary "hard look" at environmental factors in reaching their decision,[17] both by extensive consideration of

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supra, applies to Commission rail abandonment proceedings conducted pursuant to 49 U.S.C. 1(18). The court apparently assumed that such proceedings, like those in *Greene County* and *Calvert Cliffs'*, must be heard initially by a hearing examiner and reviewed by the Commission. The government has not yet decided whether to seek further review of *Harlem Valley*.

[16] In *Life of the Land*, the draft impact statement was circulated after the hearing required by the agency's statute had been held. The final statement was then approved by responsible agency officials. The court concluded that the publication and dissemination of the statement complied with Section 102(2)(C). It emphasized that there had been substantial consideration of environmental issues at all stages of the proceedings.

[17] *Natural Resources Defense Council, Inc.* v. *Morton*, 458 F.2d 827, 838 (C.A. D.C.); cf. *Upper Pecos Ass'n, Inc.* v.

environmental matters at the hearing before the October 4 decision, and in reviewing the environmental impact statement and the comments thereon before reaching their May 2 decision.[18] There was also adequate opportunity for public participation, both in the October hearing and in the request for comments on the draft impact statement. Cf. *Hanly* v. *Kleindienst*, 471 F.2d 823, 836 (C.A. 2), certiorari denied, 412 U.S. 908.

Stans, 452 F.2d 1233, 1236 (C.A. 10); *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, 463 F.2d 783 (C.A. D.C.).

[18] The Commission's action here was thus not inconsistent with what the court in *Harlem Valley, supra*, slip op. at 4287-4288, identified as "the policies behind the decision in *Greene County I*, the dangers that an agency will rely on self-serving statements by an applicant and will place the burden of analyzing environmental issues upon intervenors * * *." The environmental questions were addressed independently by the Commission both before and after the October 4 order. See n. 5 *supra*; Impact Statement, pp. 92, 102.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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JULY 1974.

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 971-72

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), PLAINTIFF,

and

COUNCIL ON ENVIRONMENTAL QUALITY, INVOLUNTARY PLAINTIFF,

and

ENVIRONMENTAL DEFENSE FUND, ET AL., PLAINTIFF-INTERVENORS,

and

NATIONAL ASSOCIATION OF SECONDARY MATERIALS INDUSTRIES, INC., ET AL., PLAINTIFF-INTERVENORS,

and

INSTITUTE OF SCRAP IRON AND STEEL, INC. and JULIAN C. COHEN SALVAGE CORPORATION, PLAINTIFF-INTERVENORS

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, DEFENDANTS,

and

THE ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL., DEFENDANT-INTERVENORS

Feb. 19, 1974

Proceeding in which environmental groups and others sought a declaration that ICC had failed to

comply with National Environmental Policy Act in authorizing railroad rate increases on shipment of recyclables and that orders approving increases were void, an order enjoining the ICC to reconsider general rate increases in accordance with strict demands of the Act, and an injunction forbidding railroads from collecting rate increases on recyclables until ICC complied with the act. On plaintiffs' and defendants' cross motions for summary judgment, a three-judge United States District Court for the District of Columbia, J. Skelly Wright, Circuit Judge, determined that the ICC's efforts to meet the commands of the Act were substantially deficient, that order authorizing rate increases should be vacated, and that proceeding should be remanded to the Commission for fulfillment of the Act's obligations, but, because of uncertainty concerning meaning of a Supreme Court decision, refrained from issuing an injunction restraining railroad's collecting the increased rates pending the ICC's reconsideration.

Order accordingly.

Flannery, District Judge, dissented and filed opinion.

1. Commerce § 152

Three-judge federal district court had jurisdiction to review Interstate Commerce Commission's compliance, in authorizing railroad rate increases on shipment of recyclable commodities, with commands of the National Environmental Policy Act. 28 U.S.C.A. §§ 1336, 2321-2325; Interstate Commerce Act, §§ 13

(1), 15(1, 7), 16(1), 49 U.S.C.A. §§ 13(1), 15(1, 7), 16(1); National Environmental Policy Act of 1969, §§ 101, 102, 102(2)(C), 42 U.S.C.A. §§ 4331, 4332, 4332(2)(C).

2. Health and Environment § 25.10

Purpose of procedural requirements of National Environmental Policy Act, which prescribes not only what considerations must be addressed in an environmental impact statement but also how the statement is to be developed and utilized, is to insure that federal agencies integrate consideration of potential environmental impacts of their contemplated actions with the policy considerations traditionally attending such actions. National Environmental Policy Act of 1969, § 102(2)(C), 42 U.S.C.A. § 4332(2)(C).

3. Health and Environment § 25.10

In light of facts, inter alia, that ICC's order explaining why national transportation policy warranted general rate increase on recyclables was made without benefit of an impact statement, that ICC prepared environmental statement only after an avalanche of criticism from environmental groups, that ICC did not decide to start over again to reconsider fully question of such rate increases and instead merely opened case for limited purpose of further evaluating environmental effects of increased rates on movement of recyclables, and that ICC did not even take its after-the-fact environmental considerations through existing agency review processes, ICC's prep-

aration and utilization of its impact statement failed to comport with obligations imposed on it by National Environmental Policy Act. National Environmental Policy Act of 1969, § 102(2)(C), 42 U.S.C.A. § 4332(2)(C).

4. Health and Environment § 25.10

A reviewing court must demand more than pro forma compliance with section of National Environmental Policy Act prescribing what considerations must be addressed in an environmental impact statement and how statement is to be developed and utilized; it must be assured that the agency engaged in a full and good faith individualized consideration and balancing of environmental factors. National Environmental Policy Act of 1969, § 102(2)(C), 42 U.S.C.A. § 4332(2)(C).

5. Health and Environment § 25.10

ICC statement on environmental impact of railroad rate increases on shipment of recyclables, which failed to include, inter alia, an analysis of underlying rate structure's impact on movement of recyclables, failed to comport with obligations imposed on the ICC by the Environmental National Policy Act. National Environmental Policy Act of 1969, § 102(2)(C), 42 U.S.C.A. § 4332(2)(C).

6. Health and Environment § 25.10

Phrase "existing agency review processes," in section of National Environmental Policy Act which re-

quires that environmental impact statement be transmitted through existing agency review processes, encompasses not only procedures required by explicit agency regulations but also those procedures which an agency customarily employs in consideration of a proposal of the type being analyzed for its environmental impact. National Environmental Policy Act of 1969, § 102(2)(C), 42 U.S.C.A. § 4332(2)(C).

See publications Words and Phrases for other judicial constructions and definitions.

John F. Banzhaf, III, and Peter H. Meyers, Washington, D.C., for plaintiff SCRAP.

John F. Dienelt and Scott H. Lang, Washington, D.C., for plaintiff-intervenors Environmental Defense Fund and others.

Edward L. Merrigan, Washington, D.C., for plaintiff-intervenors National Association of Secondary Materials Industries, Inc. and others.

Thomas H. Boggs, Jr., George Blow, and E. Bruce Butler, Washington, D.C., for plaintiff-intervenors Institute of Scrap Iron and Steel, Inc., and others.

Asst. Atty. Gen. Shiro Kashiwa, Harold H. Titus, Jr., U. S. Atty., and William M. Cohen, Atty., Dept. of Justice, for defendant United States of America.

Fritz R. Kahn, Gen. Counsel, Betty Jo Christian, Associate Gen. Counsel, and Theodore C. Knappen, Hanford O'Hara, Charles H. White, Jr., and James F. Tao, Attys., Interstate Commerce Commission, for defendant Interstate Commerce Commission.

T. A. Miller, San Francisco, Cal., Albert B. Russ, Jr., Richmond, Va., Edward A. Kaier, Philadelphia, Pa., and Charles A. Horsky, Michael Boudin, Michael J. Henke, Walter Hellerstein and James L. Tapley, Washington, D.C., for defendant-intervenors Aberdeen and Rockfish Railroad Company and others.

Before WRIGHT, Circuit Judge, and RICHEY and FLANNERY, District Judges.

J. SKELLY WRIGHT, Circuit Judge:

Plaintiff and plaintiff-intervenors challenge an order of the Interstate Commerce Commission (ICC) authorizing railroad rate increases on shipment of recyclable commodities on the ground that the Commission has failed to comply with the prescriptions of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.* (1970). Both plaintiffs and defendants have moved for summary judgment. We find that the Commission's efforts to meet the commands of NEPA were substantially deficient. We thus vacate the Commission's order authorizing the rate increases on recyclable commodities and remand the proceeding to the Commission for fulfillment of its NEPA obligations. However, because of our uncertainty concerning the meaning of the Supreme Court's decision last term in Atchison, Topeka & Santa Fe R. Co. v. Wichita Board of Trade, 412 U.S. 800, 93 S.Ct. 2367, 37 L.Ed.2d 350 (1973), we refrain from issuing an injunction restraining the railroads from collecting the increased rates pending the Commission's reconsideration.

I

This case has had a long and complicated history. Inasmuch as it has produced two previous opinions [1] by this court [2] and one by the Supreme Court,[3] however, we shall attempt to set forth only those facts relevant to the motions now before us. Having secured Commission approval of a two and a half per cent temporary emergency surcharge in February 1971 on nearly all freight rates, the nation's railroads on March 17, 1972 filed tariffs with the Commission for permanent selective increases averaging four per cent on most commodities. Under the Interstate Commerce Act tariff changes filed by carriers go into effect automatically unless the Commission deems that an investigation of the lawfulness of these tariffs is advisable and that the rates should be suspended pending such an investigation. 49 U.S.C. § 15(7) (1970). On April 24, 1972 the Commission announced its intention to investigate the permanent increases and suspended these increases for the full seven-month period permitted by Section 15(7).

Students Challenging Regulatory Agency Procedures (SCRAP) then commenced this action, contending that NEPA compelled the Commission to prepare and consider an environmental impact statement be-

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[1] 353 F.Supp. 317 (1973); 346 F.Supp 189 (1972).

[2] This is a three-judge court convened pursuant to 28 U.S.C. §§ 2325 & 2284 (1970).

[3] United States v. SCRAP, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973).

fore permitting any rate increases—including the temporary two and a half per cent surcharge. SCRAP, which was later to be joined by other environmental groups and scrap dealer associations,[4] argued that the rate increases discouraged the environmentally desirable use of recyclable commodities not only by raising the costs of shipping recyclables, but also by aggravating "the preexisting disparity in shipping costs between these materials and the primary goods with which they compete."[5] In response to this theory, we held that even the temporary surcharge was a major action "significantly affecting the quality of the human environment," 42 U.S.C. § 4332 (2) (C), and that the Commission therefore had violated NEPA by not preparing and considering a NEPA impact statement before issuing its order permitting the temporary surcharge. We held that any challenge to the permanent increase was not ripe for review inasmuch as the Commission had not then yet issued an order approving this increase. We did, however, retain jurisdiction to ensure that the Com-

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[4] SCRAP, an unincorporated association of law students, was formed to enhance environmental quality. The Environmental Defense Fund, the National Parks & Conservation Association, and the Izaak Walton League of America entered the action in its initial stages as plaintiff-intervenors. The National Association of Secondary Materials Industries and the Institute of Scrap Iron & Steel have more recently intervened. All of these parties will be referred to hereinafter as plaintiffs.

[5] 346 F.Supp. at 191.

mission would comply with NEPA.[6] We further issued a preliminary injunction restraining the temporary surcharge insofar as it applied to recyclable commodities. The Supreme Court reversed the injunction on June 18, 1973. United States v. SCRAP, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973). Relying on Arrow Transportation Co. v. Southern R. Co., 372 U.S. 658, 83 S.Ct. 984, 10 L.Ed.2d 52 (1963), the Court held that Section 15(7) vested exclusive jurisdiction in the Commission to suspend rates pending its final decision on their lawfulness.[7]

Meanwhile the Commission's investigation of the proposed permanent increases culminated in a hearing consisting of submission of briefs and oral argument by concerned parties. Though the Commission had told the Chief Justice, in connection with its application for a stay of our order against the temporary surcharge, as well as this court, that it was developing an impact statement, no statement was prepared for consideration at this hearing or even for consideration by the Commission before issuing its decision on the permanent increases. That decision, which was issued October 4, 1972, approved most of the selective increases. Ex Parte No. 281, Increased Freight Rates and Charges, 1972, 341 ICC 288 (1972). The decision included some discussion of environmental considerations and limited the rate increases on *nonferrous* scrap to three per cent, but

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[6] *Id.* at 198-201.

[7] 412 U.S. at 690-699, 93 S.Ct. 2405.

it generally concluded that the new tariffs would not significantly affect the quality of the human environment and that there was thus no necessity for a formal impact statement. The Commission's failure to prepare a formal statement provoked vehement protestations from the President's Council on Environmental Quality (CEQ), from the Environmental Protection Agency (EPA), and from plaintiffs.* Plaintiff SCRAP filed with this court on November 7, 1972 a motion to enjoin the approved increases. On the same day as this filing, the Commission suddenly shifted its position by suspending, until June 1973, rate increases on all goods being shipped for purposes of recycling and by reopening its investigation in Ex Parte No. 281.* The Commission stated that the proceeding was reopened for "the limited purpose of further evaluating, in accordance with [NEPA],

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" * * The Environmental Protection Agency (EPA) stated its regret that the Commission chose not to submit a formal impact statement, arguing that 'the historical data presented by the Commission does not support the conclusion that * * * there will be no adverse environmental impact.' CEQ, in its letter to the Commission, felt that the conclusion that the October 4 order would have no significant environmental impact 'seems unresponsive to the language of our NEPA guidelines * * *.'"

353 F.Supp. at 321.

* Following the Commission's Oct. 4 order and opinion, the railroads refiled their increases, including the increases on recyclables, in accordance with the order and the exceptions they made to the Commission's general approval. It was these refiled tariffs as they related to recyclables which the Commission suspended.

the environmental effects of increased railroad freight rates and charges on the movements of commodities being transported for the purpose of recycling * * *." [10] In light of the Commission's action, we denied SCRAP's request for a preliminary injunction. We found that no relief was necessary for the suspended increases on recyclables and that there was not sufficient likelihood that the plaintiffs would be successful in showing that an impact statement was required before increasing rates on nonrecyclables. We reserved decision on the merits.

The Commission proceeded to prepare its statement on the environmental impact of the recyclable rate increases. The Commission's draft statement was issued March 5, 1973. It was circulated to several concerned Executive agencies and departments and to all of the parties in this action. Not only the plaintiffs but also the Executive agencies and departments, including EPA, CEQ, General Services Administration, Department of the Interior, and Department of Commerce, responded with extensive comments critical of this draft statement and its conclusions. These comments, although acknowledged by the Commission in its final statement, did not move the Commission to change in any substantial way its conclusions or even its analysis. The Commission denied the request of plaintiffs to schedule a new set of hearings in the reopened proceedings. The Commission served its final environmental impact state-

[10] 353 F.Supp. at 321.

ment on May 7, 1973. The statement's analysis was limited to the marginal impact of the most recent rate increases; it stated that a general rate increase proceeding did not provide an appropriate occasion to examine whether the underlying rate structure discriminated against recyclable commodities with significant adverse environmental consequences.[11] Though it contained no rigorous economic analysis of the responsiveness of the demand for recyclables to changes in transportation costs, the statement's conclusion echoed the Commission's original position in its October 1972 order that the increases would not have a significant adverse effect on the environment. The statement further pronounced that even if some adverse environmental impact could be anticipated[12] the increases would be justified by the need to ensure a viable and efficient railroad system. The Commission did not use this staff-prepared statement and the critical comments on the draft statement to develop a new opinion to supplant or even supplement its October opinion. Instead the Commission merely appended a one-sentence order to the statement's back page which adopted the entire statement as part of its prior opinion on the rate increases and discontinued Ex Parte No. 281.

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[11] ICC, Ex Parte No. 281, Increased Freight Rates and Charges, 1972 (Environmental Matters) 22 (May 7, 1973) (hereinafter "Environmental Impact Statement").

[12] The statement actually did concede at one point that the rate increase would probably cause a decline in utilization of glass scrap. *Id.* at 155.

On May 30, 1973 SCRAP and plaintiff-intervenor Environmental Defense Fund (EDF) filed a motion in this court for a preliminary injunction against the rate increases on recyclable commodities which the railroads intended to place in effect when the suspension period ended on June 10. On June 7 this court, finding a sufficient likelihood that plaintiffs would be successful in their present challenge to the rate increases, issued a temporary injunction restraining the Commission and the railroads from collecting the increases "until further order of this court." This injunction was stayed by Chief Justice Burger. On November 19, 1973 the Supreme Court vacated the injunction and remanded the case to this court for further consideration in light of Atchison, Topeka & Santa Fe R. Co. v. Wichita Board of Trade, *supra*.[13]

Plaintiffs now ask this court for: a declaration that the ICC has failed to comply with NEPA and that the orders approving the increases are thus void; an order enjoining the Commission to reconsider the general rate increases in accordance with the strict demands of NEPA; and an injunction forbidding the railroads from collecting the rate increases on recyclables until the Commission does so comply with NEPA. Plaintiffs and defendants have filed cross motions for summary judgment, and on these motions we now consider whether it is appropri-

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[13] United States v. SCRAP, —— U.S. ——, 94 S.Ct. 533, 38 L.Ed.2d 326 (1973).

ate for this court to grant plaintiffs' requests for relief.

II

[1] We must first address the contention of the railroads, who have intervened as defendants, that we lack jurisdiction to review the Commission's compliance with the commands of NEPA. The railroads' position is based on cases dating back almost 40 years which refused to review challenges of shippers to general revenue orders like those of October 4, 1972 and May 2, 1973.[14] These decisions were not compelled by any statutory limitation on the courts' power; three-judge District Courts have jurisdiction "to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission * * *." 28 U.S.C. § 2321 (1970); 28 U.S.C. § 1336 (1970). *See* 28 U.S.C. §§ 2322-2325 (1970). The decisions were instead predicated upon the judicially developed doctrines of ripeness and exhaustion of administrative remedies. The courts stressed that the Commission's approbation of a general rate increase under Section 15(7) was merely

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[14] *See, e.g.*, Algoma Coal & Coke Co. v. United States, E.D.Va., 11 F.Supp. 487 (1935); Koppers Co. v. United States, W.D.Pa., 132 F.Supp. 159 (1955); Atlantic City Electric Co. v. United States, S.D.N.Y., 306 F.Supp. 338 (1969), and Alabama Power Co. v. United States, D.D.C., 316 F.Supp. 337 (1969), *both affirmed by equally divided Court*, 400 U.S. 73, 91 S.Ct. 259, 27 L.Ed.2d 212 (1970); Electronic Industries Assn v. United States, D.D.C., 310 F.Supp. 1286 (1970), *affirmed per curiam*, 401 U.S. 967, 91 S.Ct. 1188, 28 L.Ed.2d 318 (1971).

an acceptance of the railroads' need for more revenue, that the shippers could challenge the reasonableness of particular rates affecting them under Sections 13(1), 15(1) and 16(1) of the Interstate Commerce Act, 49 U.S.C. §§ 13(1), 15(1), 16(1) (1970), and that only in a decision pursuant to such a challenge did the Commission render a judgment on the reasonableness of particular rates as applied to particular shippers. The courts thus reasoned that to review carriers' challenges to a Section 15(7) order would be to interfere at an intermediate stage in the rate-making process before the carriers had exhausted their remedies before the Commission.

However, as we indicated in our first opinion in this case,[15] we do not feel restrained by these cases from reviewing plaintiffs' challenges to the Commission's orders. First, the precedential force of the cases is now in substantial doubt. Two of the most recent, Alabama Power Co. v. United States, D.D.C., 316 F.Supp. 337 (1969), and Atlantic City Electric Co. v. United States, S.D.N.Y., 306 F. Supp. 338 (1969), were affirmed without opinion by only an equally divided Court, 400 U.S. 73, 91 S.Ct. 259, 27 L.Ed.2d 212 (1970). Only last term the Court indicated that the jurisdictional question presented by these cases, while a serious one, was not settled.[16]

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[15] 346 F.Supp. at 198.

[16] In Atchison, Topeka & Santa Fe R. Co. v. Wichita Board of Trade, 412 U.S. 800, 93 S.Ct. 2367, 37 L.Ed.2d 350 (1973); the Court reviewed a Commission order that particular rates were just and reasonable. The plurality opinion stated that

In *Alabama Power* and *Atlantic City* the shippers' challenges were directed to the Commission's decision that the general increases were warranted by the railroads' revenue needs rather than to the reasonableness of any particular rates. We adhere to the view expressed in the dissent in *Alabama Power* that challenges such as these can best be considered in direct review of the Commission's Section 15(7) decision rather than "in countless rate-making proceedings involving individual commodities." [17] The instant case does not present challenges to the reasonableness of particular rates on particular railroads between particular points; it presents challenges to the Commission's determination that the railroads' general revenue needs justify the costs to shippers and to the environment of a general rate increase on recyclables.[18] The Commission has made what it believes to be its final decision on this general balancing; it surely does not intend to reconsider this decision after a Section 13 challenge to a particular rate.

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if the grain charges "were just like a general rate incrase, serious questions would arise about the jurisdiction of the District Court to review the Commission's order." *Id.* at 814 n. 10, 93 S.Ct. at 2378.

[17] Alabama Power Co. v. United States, *supra* note 14, 316 F.Supp. at 339.

[18] We thus find misplaced the railroads' reliance on Electronic Industries Assn v. United States, *supra* note 14, which was affirmed unanimously by the Supreme Court without opinion. In that case the shippers attacked as unreasonable and arbitrary only that portion of a Commission § 15(7) order permitting increased rates on two particular items. 310 F.Supp. at 1287.

We do not, however, rest on an application of the analysis advanced in the dissent in *Alabama Power*. For as stated in our first *SCRAP* opinion [19] the cases cited by the railroads are all distinguishable from a case challenging the Commission's compliance with NEPA in approving a general rate increase. We first note that however adequate a Section 13 proceeding might be to a shipper who questions the railroads' need for a general rate increase, it is at least questionable that environmental groups such as SCRAP have standing to initiate Section 13 proceedings during which they could attempt to contest the Commission's compliance with NEPA. Sections 13(1), 15(1) and 16(1) permit any person or association to complain of carrier action in contravention of the Interstate Commerce Act and empower the Commission to investigate such complaints and remedy any violation of the Act, including granting reparations for unreasonable or prejudicial charges on particular items shipped. It is suggested that an environmental group, while it could not obtain reparations, should be able to complain that a particular charge on a particular item is unreasonable because of its environmental effects. Thus if SCRAP could initiate an investigation on this theory, it could argue further that before rejecting the complaint the Commission would have to prepare and consider an environmental impact statement. But we know of no Commission order or judicial opinion accepting this theory and it is thus too speculative and too unrealistic to support a denial

[19] 346 F.Supp. at 198.

of jurisdiction. It is true that two scrap dealers associations have intervened in this action to help champion the environmental cause and that these associations or their members may bring Section 13 challenges to particular rates which they could argue the Commission could not reject without compliance with NEPA. But we cannot rest a holding on the fortuity that here shippers as well as environmental groups challenge the Commission's compliance with NEPA. Moreover, to refuse to consider the challenges of environmental groups to agency compliance with NEPA because economically interested parties might make similar challenges in later proceedings would significantly dilute the Supreme Court's holding, on review of our first opinion in this case, that SCRAP has full standing, equal to and not derived from the standing of economically interested parties, to seek review of Commission action which allegedly harms SCRAP's members in their use of the environment.[20]

Even if environmental groups could initiate proceedings pursuant to Section 13(1), an appeal from a Commission order on the reasonablenes of a particular rate would not be an appropriate time for a court to review the Commission's challenged compliance with NEPA. Plaintiffs have persuasively argued that NEPA compels the Commission, before approving a general rate increase, to consider whether the rate increases on recyclables collectively have a significant environmental impact and, if so, whether

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[20] United States v. SCRAP, *supra* note 3, 412 U.S. at 683-690, 93 S.Ct. 2405.

this impact is justified by the railroads' need for increased revenues. These are far different questions from whether a particular rate, in light of environmental considerations, is unreasonable or discriminatory. Even if a court in reviewing a Commission order on the reasonableness of a particular rate were able on the record before it to review the Commission's compliance with NEPA, the court's decision would affect only the particular rate challenged. Thus burdensome relitigation of each particular rate would be required to challenge all the rates which collectively impact the environment. Finally, we note that delay is of greater import here than in previous cases where review of general rate orders was refused. While the Act provides for reparations to shippers who successfully challenge particular rates after they have become effective, the environmental degradation which continues while challenges to particular rates are being considered may not be reparable at all.

Our reliance on NEPA in finding jurisdiction is not inconsistent with the Supreme Court's admonition in its SCRAP opinion that "NEPA was not intended to repeal by implication any other statute." [21] The Court did not suggest that NEPA was to be ignored by the courts in considering threshold jurisdictional issues.[22]

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[21] *Id.* at 694, 93 S.Ct. at 2419.

[22] The Court's implicit approval of the assertion of jurisdiction in Committee for Nuclear Responsibility, Inc. v. Seaborg, 149 U.S.App.D.C. 380, 463 F.2d 783 (1971), suggests much

The Court in *SCRAP* held only that NEPA did not revive judicial power that had been previously explicitly eliminated by Congress. 412 U.S. at 692-695, 93 S.Ct. 2405. This time we do not wield NEPA in the face of any statutory limitations on our jurisdiction; there is nothing in the Interstate Commerce Act which precludes our jurisdiction to review Section 15(7) orders, whatever the limits it imposes on our injunctive power over carriers. We, like the previous courts which, in a non-NEPA context, declined to review general rate orders, are applying broad jurisdictional provisions, 28 U.S.C. §§ 1336, 2321, giving us power to review "any order" of the ICC. These provisions demand supplementation by other statutes and by judicially developed doctrines which limit court review of agency action. As stated above, previous courts found two of these doctrines to preclude court review of general rate orders. We find that the existence of NEPA requires us to reconsider the application of these doctrines and in NEPA cases to accept more of the broad jurisdictional authority granted us.

III

We thus turn to an examination of the Commission's fulfillment of the NEPA mandate. We do not feel it necessary to rehearse at the outset the full

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the reverse. 412 U.S. at 695-696, 93 S.Ct. 2405. The *Seaborg* court reviewed whether a decision to conduct a nuclear test was made in compliance with NEPA though, as we noted in our first *SCRAP* opinion, 346 F.Supp. at 197, absent NEPA no court would have authority to review such a decision.

structure and the particularized requirements of NEPA. Previous courts have done so adequately.[23] We do, however, think it important to emphasize before commencing our analysis that the courts have required strict compliance with the procedural commands of NEPA. Section 102(2)(C) of the Act, 42 U.S.C. § 4332(2)(C), prescribes in some detail not only what considerations must be addressed in an environmental impact statement, but also how the statement is to be developed and utilized. The Act states that "all agencies of the Federal Government" are to comply with these prescriptions "to the fullest extent possible." 42 U.S.C. § 4332. Far from providing "an escape hatch for footdragging agencies," this language "sets a high standard for the agencies, a standard which must be rigorously enforced by the reviewing courts." Calvert Cliffs' Coordinating Committee v. USAEC, 146 U.S.App.D.C. 33, 38, 449 F.2d 1109, 1114 (1971). Because of the extent of plaintiffs' attack on the impact statement, we further note that the courts' substantive review of agency action pursuant to NEPA is much more limited. Once a court is satisfied that the agency has "fully and in good faith" met all of NEPA's procedural requirements, it should not reverse an agency decision on the merits unless it can determine that the decision was "arbitrary or clearly gave insufficient weight to

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[23] *See, e.g.*, Environmental Defense Fund, Inc. v. Corps of Engineers, United States Army, 8 Cir., 470 F.2d 289 (1972); Calvert Cliffs' Coordinating Committee v. USAEC, 146 U.S. App.D.C. 33, 449 F.2d 1109 (1971).

environmental values." *Id.*, 146 U.S.App.D.C. at 39, 449 F.2d at 1115.[24] Any substantive review would be predicated on Section 101 of the Act, 42 U.S.C. § 4331, which propounds certain substantive environmental goals which it is the "continuing responsibility of the Federal Government to use all practicable means" to achieve. One of these goals is to "enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources." However, because we view the Commission's efforts to comply with NEPA's procedural commands to be sorely deficient, we do not reach the question whether the Commission clearly gave insufficient weight to this environmental value.

[2, 3] The purpose of all the requirements imposed by Section 102(2)(C) is to ensure that federal agencies integrate consideration of the potential environmental impacts of their contemplated actions with the policy considerations traditionally attending such actions. It is for this reason that Section 102(2)(C) specifically commands that an environmental impact statement and the comments of other concerned agencies on this statement "shall accompany the proposal through the existing agency review processes." The Commission's mode of preparation and utilization of the challenged impact statement here violated both Section 102(2)(C)'s fundamental pur-

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[24] *Accord,* Conservation Council of North Carolina v. Froehlke, 4 Cir., 473 F.2d 664, 665 (1973); Environmental Defense Fund, Inc. v. Froehlke, 8 Cir., 473 F.2d 346, 353 (1972).

pose and this specific command. The Commision's October 4 order explaining why the national transportation policy warranted the general rate increase was made without the benefit of an impact statement. It was only after its October order was greeted with an avalanche of criticism from environmental groups, EPA, and CEQ that the Commission decided to prepare an environmental statement on the impact of the rate increases for recyclable commodities. The Commission did not, however, decide to start over again to reconsider fully the question of rate increases on recyclables. It instead merely reopened Ex Parte No. 281 "for the limited purpose of further evaluating * * * the environmental effects of increased railroad freight rates and charges" on the movement of recyclable commodities. ICC order of November 7, 1972. The Commission thus indicated that it had already made its decision and all that remained was to determine if the environmental effects of that decision could be justified. The Commission's May 2, 1973 order discontinuing Ex Parte No. 281 is further evidence that the Commission neither intended to give nor actually gave full reconsideration to the question of the recyclable rate increase. That one-sentence order merely adopts the entire staff-prepared impact statement. It makes no attempt to integrate the considerations of national transportation policy justifying the rate increase with the environmental considerations analyzed in the impact statement. Nor does it confront or even acknowledge the critical comments of other concerned agen-

cies and environmental groups appended to the statement. This utilization of an impact statement simply does not comport with Section 102(2)(C). Only if the statement is prepared before an agency decision is made can it serve its purpose of informing the decision-making process at every stage. "Compliance to the '*fullest*' possible extent would seem to demand that environmental issues be considered at every important stage in the decision making process * * *." Calvert Cliffs' Coordinating Committee v. USAEC, *supra*, 146 U.S.App.D.C. at 42, 449 F.2d at 1118 (emphasis in original).[25] If the agency fails to pre-

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[25] *See also* Environmental Defense Fund, Inc. v. Armstrong, N.D.Cal., 352 F.Supp. 50, 55 (1972) (an impact statement "is not to be merely an exercise in project justification but rather a working paper of sorts, one essential input into agency decisions concerning the contours of Federal action").

In his dissent to the Court's reversal of our first *SCRAP* opinion, Mr. Justice Douglas quotes Congressman Dingell, a main sponsor of NEPA. That quotation unfortunately is even more appropriate at this stage of the *SCRAP* litigation.

> "* * * Some agencies are complying poorly. They decide what they are going to do and then write an environmental impact statement to support the decision. That is not what Congress had in mind. I am fearful that we are breeding a race of impact statement writers who put all the right words down but don't really get environmental concerns involved in the decision-making process. * * *"

United States v. SCRAP, *supra* note 3, 412 U.S. at 713 n. 10, 93 S.Ct. at 2429. CEQ must have been aware of this problem in drafting its advisory guidelines on agency compliance with NEPA. These guidelines state:

> "* * * It is important that draft environmental statements be prepared and circulated for comment and

pare an impact statement before making a decision significantly affecting the environment, it must start its procedures over again, including the procedure required by Section 102 of NEPA, so that the decision-making process can be fully informed throughout.

In this case, not only did the Commission fail to start over in considering whether to approve the rate increases, it did not even take its after-the-fact environmental consideration through the entire "existing agency review processes." The "processes" for Commission review of proposed general rate increases are set forth in Section 15(7) of the Interstate Commerce Act. The Commission is empowered by the section to make orders concerning these proposed rates "after full hearing." The Commission held a hearing before its October 4 order before it had even commenced preparing an impact statement. It refused, however, to hold another hearing to reconsider the increase on recyclables it had already decided upon in light of the impact statement it had prepared. It should be clear to all agencies by now that hearings are key aspects of agency review processes during

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furnished to the Council as early as possible in the agency review process in order to permit agency decisionmakers and outside reviewers to give meaningful consideration to the environmental issues involved. In particular, agencies should keep in mind that such statements are to serve as the means of assessing the environmental impact of proposed agency actions, rather than as a justification for decisions already made. * * *"

38 Fed.Reg. 10858 (1973).

which environmental impact statements must be considered. The words of the Court of Appeals for the Second Circuit are clear:

> "* * * [W]e conclude that the Commission was in violation of NEPA by conducting hearings prior to the preparation *by its staff* of its own impact statement * * *. * * *
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> "* * * [T]he statement may well go to waste unless it is subject to the full scrutiny of the hearing process * * *."

Greene County Planning Board v. FPC, 2 Cir., 455 F.2d 412, 422 (1972) (emphasis in original). And the words of the Court of Appeals for the District of Columbia Circuit are equally clear:

> "The question here is whether the Commission is correct in thinking that its NEPA responsibilities may be 'carried out in toto outside the hearing process'—whether it is enough that environmental data and evaluations merely 'accompany' an application through the review process, but receive no consideration whatever from the hearing board."

Calvert Cliffs' Coordinating Committee v. USAEC, *supra*, 146 U.S.App.D.C. at 41, 449 F.2d at 1117. The railroads attempt to distinguish *Greene County* and *Calvert Cliffs'* by stressing that in those cases the agency hearings produced an examiner or hearing board report as an initial stage in the decision-making process, while in a general revenue proceeding the first and only decision is that of the Commission itself. But there is nothing in either of the cases,

or more importantly in Section 102(2)(C), to indicate that, because a stage in the review process during which the proposed action is considered does not culminate in an intermediate agency opinion, that stage may be circumvented for purposes of NEPA. Indeed where, as here, the hearing is before the Commission itself, and is the only one provided, it may well be the most important stage in the decision-making process.

The Commission attempts to defend its refusal to hold hearings during which the impact statement could have been considered by arguing that those with environmental concerns had adequate opportunity to comment on the approval of the rate increase. The Commision primarily refers to the oral hearing held prior to the October order during which environmental comments were in order and to the Commission's solicitation of comments on the draft environmental statement. Neither can substitute for strict compliance with the commands of Section 102 (2)(C). During the oral hearing held prior to the October order there was no impact statement, draft or otherwise, upon which environmentally concerned parties could focus their comments; nor was there any statement to inform the Commission as to the worth of any environmental comments which were made. The comments on the draft statement, prepared subsequent to the October order, were directed to and considered by the agency staff members who prepared the statement. Section 15(7) hearings are to be held by the Commission itself and are a stage

at which the Commissioners can be informed of environmental considerations. They thus constitute an independent and important stage in the agency review process.

IV

[4] If what we have discussed above was all that was wrong with the Commission's compliance with Section 102(2)(C)'s requirements, it might be sufficient for the Commission to hold another hearing in which all parties could participate fully in canvassing the NEPA and national transportation policy considerations concerned with rate increases. The Commission could then make a thorough reconsideration of the proposed recyclable rate increase in light of that hearing and the impact statement which it has already prepared. However, we find the statement itself to be deficient and to require repreparation. The statement seems to meet the prescriptions of NEPA as to form; it has sections, for instance, on the five considerations which NEPA requires agencies to address in their statements. However, as we stated above, a reviewing court must demand more than *pro forma* compliance with Section 102(2)(C); it must be assured that the agency engaged in a full and good faith "individualized consideration and balancing of environmental factors." Calvert Cliffs' Coordinating Committee v. USAEC, *supra*, 146 U.S. App.D.C. at 39, 449 F.2d at 1115.[36] We perused the

[36] "Compliance with NEPA is not established merely by the filing of an impact statement in the form and by the pro-

statement carefully and cannot find that it presents such a full and good faith consideration and balancing. This conclusion is not surprising given the above-recounted history of the statement's post-decision preparation.

We note first that a reader of the statement must be struck by the combative, defensive and advocatory language and style in which it is written. The statement continually attacks the views of those opposing the increase, denominating these "one-dimensional" [27] and impaired by "syndromes." [28] One report is slighted merely because it was prepared by urban groups [29] and EPA is chided for needing a course in the fundamentals of rate regulation.[30] Nowhere does the statement set forth an environmental argument against the rate increase as its own or as worthy of even partial acceptance; environmental arguments are ascribed to others and then rebutted.[31] The state-

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cedure outlined by the statute." Brooks v. Volpe, W.D.Wash., 350 F.Supp. 269, 275 (1972). *See also* City of New York v. United States, E.D.N.Y., 344 F.Supp. 929, 940 (1972); Environmental Defense Fund, Inc. v. Corps of Engineers, United States Army, E.D.Ark., 342 F.Supp. 1211, 1214 (1972); cases cited at note 23 *supra* (all requiring "good faith" compliance).

[27] Environmental Impact Statement, *supra* note 11, at 11-12.

[28] *Id.* at 14.

[29] *Id.* at 10.

[30] *Id.* at 194.

[31] To this extent at least, the statement is not in accord with CEQ's advisory guidelines that a statement is not to "be used as a promotional document in favor of the proposal, at the expense of a thorough and rigorous analysis of environmental

ment's defensiveness, and the Commission's insensitivity to its NEPA responsibilities, are even manifested at one point by an assertion that NEPA does not require any balancing of environmental costs: "[W]e find in [NEPA] no Congressional expression that we should invalidate railroad rate proposals otherwise shown by the proponents to be just and reasonable under the Interstate Commerce Act." [22] To be sure, a court probably would not declare a statement to give less than full and good faith consideration on the basis of its language and style alone. But we deem this language and style to be at least evidentiary of the fullness and the fairness of the agency's consideration.

More important to our judgment on the adequacy of the impact statement is its handling of the comments made on the draft statement. Section 102(2)(C) states:

> "Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. * * *"

42 U.S.C. § 4332(2)(C). The Commission circulated a draft statement not only to several concerned Executive agencies and departments, but also to the par-

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risks." CEQ Memorandum to Federal Agencies on Procedures for Improving Environmental Impact Statements, 3 Env.Rep. —Cur.Dev. 82, 84 (May 19, 1972).

[22] Environmental Impact Statement, *supra* note 11, at 185.

ties in this action. Most of the recipients of the statement responded with extensive critical comments. The Commission appended these comments to the back of its final statement and in some instances made arguments against the criticisms within the body of this final statement. None of these comments, however, caused the Commission to alter even partially its conclusions or to change the statement's analysis in any noticeable way. We find the Commission's failure to alter its draft impact statement in response to three of the critical comments of other federal agencies particularly troublesome.

First, it was suggested by the Department of Commerce and EPA that a quantitative and thorough economic study be made on the responsiveness of the demand for secondary materials to changes in transportation costs. The final statement criticizes the methodology of a privately commissioned study which concludes that the development of scrap iron markets is being retarded by the transportation rate structure.[33] But the statement does not offer any rigorous price sensitivity studies of its own.[34] Instead it relies

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[33] Battelle Columbus Laboratories, Summary Report on the Impact of Railroad Freight Rates on the Recycling of Ferrous Scrap 2 (Jan. 14, 1972) (hereinafter "Summary Report").

[34] It is not, of course, sufficient under NEPA for an agency to dismiss the environmental impact studies of opponents of the proposed action. It is the agency's responsibility to engage itself in the study necessary to gauge environmental effects. "'The requirement that the statement be detailed places a heavy burden on government agencies to gather for and include in the impact statement enough information to

on general discussions of past scrap demand trends. For instance, it bases its conclusion that the challenged increases will have no significant impact on demand for iron scrap primarily on the concurrence of past scrap demand and rate increases.[35] We find the statement's reliance on this concurrence troublesome because it ignores the fact that the demand for primary goods was also increasing during the period of past rate increases and the possibility that scrap demand would have increased even more if rates on iron scrap had been held down. It is difficult for us to understand how the statement can conclude that there is no significant environmental impact without a quantitative study of the responsiveness of the demand for each type of scrap to changes in recyclable transportation costs.

Second, EPA, which placed the statement in its "inadequate" category, suggested that a Department of Transportation Burden Study establishes that at least some secondary materials are contributing more revenue over costs than do the virgin materials with which they compete.[36] The statement, however, does

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show that compliance has been genuine, not perfunctory. * * * NEPA requires each agency to undertake the research needed to adequately expose environmental harms." Brooks v. Volpe, *supra* note 26, 350 F.Supp. at 276, 279.

[35] The statement asserts at one point that a price-sensitivity study is not required because of the concrete evidence of this concurrence. Environmental Impact Statement, *supra* note 11, at 72 n. 14a.

[36] Dept. of Transportation, An Estimation of the Distribution of the Rail Revenue Construbtion by Commodity Groups and Type of Rail Car—1969 (Jan. 1973).

not provide any comprehensive alternative analysis of the relative cost contribution of secondary and primary materials; it shows only that one type of scrap is not disadvantaged within one area relative to its competing virgin material.[37] The statement also speculates as to why the rate disparities might be cost-justified and stresses that railroad pricing is not in any case totally cost-based; it does not, however, present a rigorous analysis of what justifies the specific disparities between primary and secondary rates. We think that if the transportation costs do affect the demand for recyclable commodities, the impact statement must establish the particular justifications for the rate disparities.

Third, both EPA and CEQ criticized the draft statement for failing to consider the impact of the rate increase on long-term investment in facilities which can make fuller productive use of recyclables. The final statement was not modified in response to this criticism. Though in explaining why transportation rates have little impact on scrap demand the statement repeatedly makes reference to the technological and capital constraints on the use of scrap, the statement does not make any economic analysis of whether a hold down on recyclable rate increases might encourage the investment necessary to overcome these constraints. The statement does not, for instance, respond to one study's conclusion that the rate differential between iron ore and scrap iron plays a "crucial and negative" role in the decision of

[37] Environmental Impact Statement, *supra* note 11, at 51.

steel manufacturers to invest in facilities such as electric arc furnaces which can produce steel using all scrap and no virgin iron ore.[38]

The final statement's failure to address adequately the above three criticisms of the draft statement can be derived from what we view as its most fundamental and important deficiency—the limitation of its analysis to the marginal impact of the most recent rate increase with no discussion of whether the underlying rate structure itself significantly affects the environment. The statement makes this limitation of its analysis explicit:

> "It is contended that our approval of increased rail rates and charges on commodities moving for recycling purposes will serve to aggravate discrimination already allegedly in the railroad freight rate structure, to the detriment of recyclable commodities and the national recycling effort. * * *
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> "* * * [S]uch a case does not provide an appropriate vehicle for examining these issues. * * *"

Environmental Impact Statement at 22. We fail to understand how any consideration of the environmental impact of approving the recyclable rate increases could be full without an analysis of how the underlying rate structure itself affects the environment. It is the underlying rate structure which the percentage increases aggravate; if this structure contributes to the degradation of our environment,

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[38] Summary Report, *supra* note 33, at 24.

then the increases would at least presumptively aggravate that contribution. It is not enough to respond that whether a substantial rate disparity significantly affects the environment is not determinative of whether a marginal increase of that disparity itself has any significant impact. Any impact on the underlying structure could be eliminated by holding down recyclable rate increases each time the railroads requested a general rate increase.[39] The Commission's failure to hold down the rate increases on recyclables would thus have a cumulative impact on the environment. Such cumulative impacts must be considered in NEPA statements. The Senate report on the passage of NEPA makes this clear:

> "* * * Environmental problems are only dealt with when they reach crisis proportions. Public desires and aspirations are seldom consulted. Important decisions concerning the use and the shape of man's future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades."

S.Rep. No. 91-296, 91st Cong., 1st Sess., 5 (1969). The advisory guidelines for implementation of NEPA issued by CEQ are responsive to this congressional intent:

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[39] As stated by EPA in criticism of the final impact statement. "There is evidence that the current rate structure is inequitable in its treatment of some secondary materials and general rate increases tend to perpetuate these inequities." Letter from Acting Deputy EPA Administrator John Quaries to ICC Secretary Robert L. Oswald dated June 6, 1973.

"* * * The statutory clause 'major Federal actions significantly affecting the quality of the human environment' is to be construed by agencies with a view to the overall, cumulative impact of the action proposed (and of further actions contemplated). * * * In considering what constitutes major action significantly affecting the environment, agencies should bear in mind that the effect of many Federal decisions about a project or complex of projects can be individually limited but cumulatively considerable. * * *"

38 Fed. Reg. 10857 (1973).[40] We suspect that if the Commission had recognized that it was obligated to consider the environmental impact of the underlying rate structure it would have had much greater difficulty justifying even to itself the deficiencies in analysis upon which we focused above. For example, absent an elasticity study the statement would not have been able by citing past trends in scrap usage to dismiss the possibility that the underlying rate structure affected the amount of recyclables transported.[41]

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[40] Courts have thus made it clear that agencies may not seize upon the concept of "distinctive and comprehensive" stages of decision-making to escape impact statement preparation on the ground that early action such as laying the first section of roadbed of a new highway will entail little environmental impact in itself. *See, e.g.*, Citizens for Clean Air, Inc. v. Corps of Engineers, United States Army, S.D.N.Y., 349 F.Supp. 696, 708 (1972).

[41] The Commission argues that if we agree with the statement's conclusion that the recyclable rate increases will not have a significant impact on the environment, no impact state-

The Commission argues that an ongoing comprehensive investigation into the railroads' freight rate structure, Ex Parte No. 270, justifies its failure to consider the environmental impact of the underlying rate structure. That investigation, having been delayed for several years, finally seems to be commencing,[42] though there apparently is some question whether this investigation will reconsider rate levels for recyclable commodities other than ferrous scrap.[43] However, regardless of how near to completion and comprehensive this study may be, it cannot substitute for the detailed impact statement which NEPA requires to be prepared *before* federal action significantly affecting the environment is taken, not in reconsideration of that action. The investigation in Ex Parte No. 270 did not and could not inform the Commission's decision-making process with respect to the rate increase on recyclables.[44] If the Commis-

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ment was required in the first place and we can uphold the Commission's orders regardless of any findings we might make of failures to comply with the prescription of § 102(2)(C). We find this line of reasoning questionable. An acceptance of the Commission's argument would encourage agencies to avoid any explicit environmental balancing by concluding in impact statements that proposed actions have no significant environmental effects. However, because the statement's limited definition of the environmental impact it considers prevents us from accepting its conclusion of no significant impact, we do not need to reach this argument.

[42] *See* 38 Fed.Reg. 28596 (1973).

[43] *See id.* at 28600.

[44] The Commission has effectively admitted both in the impact statement and in a later order that it needs to be more

sion desires to utilize analyses developed in the Ex Parte No. 270 investigation in preparing an adequate impact statement, it should, as suggested by CEQ and Commissioner Brown,[48] place a moratorium on rate increases on recyclable commodities until Ex Parte No. 270 is completed.

The necessity for the Commission to consider the environmental impact of the underlying rate structure before approving rate increases on recyclable commodities is further underscored by the recent enactment of Public Law 93-236, 93rd Congress, the

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fully informed on the environmental impact of the underlying rate structure. The final impact statement asserts that neither the costs nor the benefits of utilizing the freight rate structure "as a mechanism to allocate the costs of a recycling program * * * have been established." Environmental Impact Statement, *supra* note 11, at 192. In its notice on the recommencement of Ex Parte No. 270, the Commission stated through Commissioner Hardin:

> *"It further appearing*, that while the 1969 burden study discloses that iron and steel scrap is one of the top twenty positive revenue contributors for movements within official territory, iron ores are similar [*sic*] disclosed for movements within official territory to be one of the top twenty deficit contributors to railroad net revenues;
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> * * * *
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> *"And it further appearing*, that there are presently available insufficient facts and data to enable the Coordinator properly to assess and quantify the environmental consequences of the numerous alternatives that may be pursued in the investigation program envisioned in this proceeding as required by the NEPA * * *."

38 Fed.Reg. 28600 (1973) (italics in original).

[48] Environmental Impact Statement, *supra* note 11, at 213.

Regional Rail Reorganization Act of 1973. Section 603 of this Act requires the Commission to "adopt appropriate rules" to "eliminate discrimination against the shipment of recyclable materials in rate structures * * * where such discrimination exists." This provision is a legislative recognition of discrimination against recyclables in the existing railroad rate structure and a legislative direction to the Commission to eliminate it. The responsibility imposed by NEPA upon the Commission to "approach the maximum attainable recycling of depletable resources," 42 U.S.C. § 4331(b)(6), surely cannot be fulfilled unles this provision is complied with before rate increases on recyclable commodities are approved.

V

[5] We thus conclude that not only the Commission's preparation and utilization of its impact statement but also the contents of that statement fail to comport with the obligations imposed on the Commission by Section 102(2)(C). We vacate the Commission's October 4, 1972 and May 2, 1973 orders and direct the Commission to reopen the Ex Parte No. 281 proceedings for full consideration of the proposed rate increases on recyclable commodities.

The Commission should first prepare another draft statement to be circulated as specified by Section 102(2)(C). This new statement must include an analysis of the underlying rate structure's impact on the movement of recyclable commodities. The analysis would presumably entail a determination of the elas-

ticity of demand with respect to the price for each of several categories of recyclable commodities. The statement should also include an analysis of the effects of the rate structure on investment in manufacturing facilities which can make intensive use of scrap. Whatever impact of the rate structure on the short- and long-term demand for scrap is found should be translated into terms which meaningfully relate the environmental effects of the rates and rate increases. These effects are not necessarily limited to conservation of natural resources and elimination of solid wastes. For example, a recent EPA report states that 74 per cent less energy and 51 per cent less water are expended and 86 per cent less air pollution and 97 per cent less mining wastes are engendered when scrap iron is used in lieu of virgin ore in the production of steel.[46] All the environmental effects must be balanced against the costs, if any, to the national transportation policy of attemping to alleviate the effects by not increasing the rates.[47] Though we are aware that railroad rates are not totally cost-based, an analysis of the costs of not raising the rates would presumably include a consideration of whether the scrap shippers are now

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[46] U. S. Environmental Protection Agency, Report to Congress on Resource Recovery 8 (Feb. 22, 1973).

[47] "In some instances environmental costs may outweigh economic and technical benefits and in other instances they may not. But NEPA mandates a rather finely tuned and 'systematic' balancing analysis in each instance." Calvert Cliffs' Coordinating Committee v. USAEC, *supra* note 23, 146 U.S.App.D.C. at 37, 449 F.2d at 1113.

bearing more than their "fair share" of the railroads' freight expenses. A comprehensive study of the contribution to costs made by each category of recyclable commodities and the primary goods with which they compete will thus probably be necessary.

[6] After comments are received on the draft statement, a final statement should be prepared. This detailed statement shall then "accompany the [consideration of the proposed rate increase] through the existing agency review processes." As we have stressed above, in this case that review process includes a hearing before the Commission. Plaintiffs have argued that this hearing must be governed by Sections 556 and 557 of the Administrative Procedure Act (APA), 5 U.S.C. §§ 556, 557 (1970), and that they thus must be given the opportunity to cross-examine those staff members responsible for preparation of the statement. We cannot agree. Rate-making, involving basically legislative-type judgments, is a form of rule-making which is governed by Section 553, rather than Sections 556 and 557, of the APA. *See* United States v. Florida East Coast R. Co., 410 U.S. 224, 93 S.Ct. 810, 35 L.Ed.2d 223 (1973). Section 53(c) states: "When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply * * *." 5 U.S.C. § 553(c) (1970). But the Supreme Court, in United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 756-758, 92 S. Ct. 1941, 32 L.Ed.2d 453 (1972), held that the words "after hearing" in another similar provi-

sion of the Interstate Commerce Act do not invoke Section 553(c) and thus Sections 556 and 557. "Sections 556 and 557 need be applied 'only where the agency statute, in addition to providing a hearing, prescribes explicitly that it be "on the record."'" *Id.* at 757, 92 S.Ct. at 1950. *See also* United States v. Florida East Coast R. Co., *supra*, 410 U.S. at 234-238, 93 S.Ct. 810. We also find nothing in the existing regulations of the Commission requiring a full adjudicatory hearing. And inasmuch as NEPA requires only that the impact statement be transmitted through the *existing* agency review processes, we follow previous courts in refraining from holding that the Act requires an adjudicatory hearing where agency procedures do not provide for one.[48] We think, however, that "existing agency review processes" should be interpreted to encompass not only procedures required by explicit agency regulations but also those procedures which an agency customarily employs in consideration of a proposal of the type being analyzed for its environmental impact. In this case, when the general rate increase was first being considered without an impact statement, oral hearings were held before the Commission. This fact at least establishes a strong presumption for us that full consideration of the revised impact statement through

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[48] *See, e.g.*, Jicarilla Apache Tribe of Indians v. Morton, 9 Cir., 471 F.2d 1275, 1285-1286 (1973); National Helium Corp. v. Morton, 10 Cir., 455 F.2d 650, 656-657 (1971); City of New York v. United States, *supra* note 26, 344 F.Supp. at 939-940.

"existing agency review processes" must entail oral hearings before the Commission."

After hearings are held, a final revised order should be issued manifesting a full reconsideration by the Commission of the rate increase on recyclables. This order should not be limited to adoption of the impact statement; it should include a reassessment of the national transportation policy supporting the original October order as well as a discussion of the final impact statement prepared by the Commission's staff and of the comments on the draft statement solicited from other concerned agencies.

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[10] We further think that a strong argument could be made that oral public hearings should be held based on the CEQ advisory guidelines which state:

> "(e) Agency procedures developed pursuant to section 3(a) of these guidelines shall include provision for public hearings on actions with environmental impact whenever appropriate, and for providing the public with relevant information, including information on alternative courses of action. In deciding whether a public hearing is appropriate, an agency should consider: (i) The magnitude of the proposal in terms of economic costs, the geographic area involved, and the uniqueness or size of commitment of the resources involved; (ii) the degree of interest in the proposal, as evidenced by requests from the public and from Federal, State and local authorities that a hearing be held; (iii) the complexity of the issue and the likelihood that information will be presented at the hearing which will be of assistance to the agency in fulfilling its responsibilities under the Act; (iv) the extent to which public involvement already has been achieved through other means, such as earlier public hearings, meetings with citizen representatives, and/or written comments on the proposed action. * * *"

38 Fed.Reg. 10858 (1973).

VI

This does not, however, end the case. Plaintiffs do not merely ask for a declaration that the Commission violated the prescriptions of NEPA and an order directing it to reopen Ex Parte No. 281 for reconsideration of the recyclable rate increases in accordance with these prescriptions. They also request that we enjoin the railroads from collecting the rate increments on recyclable materials until the Commission completes its full reconsideration. Such an injunction would be necessary to hold down the rates on recyclables; under the scheme established by the Interstate Commerce Act new tariffs filed by carriers are effective absent a Commission order finding the tariffs unreasonable. *See* 49 U.S.C. §§ 6(3), 15 (1) (1970).[50]

As stated above, on June 7, 1973 we entered a temporary injunction against the railroads restraining them from collecting the rate increases pending our review of the Commission's October 4 and May 2 orders. The Supreme Court vacated this injunction and remanded the case to this court for reconsideration in light of its decision last term in Atchi-

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[50] The only consequence of our vacating the Commission's orders pending reconsideration of the rate increases "is that the railroads may not rely, in some subsequent proceeding, on a Commission finding that the proposed rates were just and reasonable. In an action for reparations, for example, the railroads could not gain any benefit from the purported Commission approval of the increases." Atchison, Topeka & Santa Fe R. Co. v. Wichita Board of Trade, *supra* note 16, 412 U.S. at 818, 93 S.Ct. at 2380.

son, Topeka & Santa Fe R. Co. v. Wichita Board of Trade, *supra*. Though it is far from clear that that decision prevents us from granting plaintiffs further injunctive relief, it raises substantial enough doubts concerning the propriety of such relief to stay our hand.

We first note that our entering an injunction against the railroads is not precluded by the Court's reversal of our first injunction in this case—the injunction entered against the 2.5 per cent surcharge pending Commission consideration of the lawfulness of rate increases. In that reversal the Court held that Section 15(7) gave exclusive jurisdiction to the ICC to suspend rates pending its final decision on their lawfulness. United States v. SCRAP, *supra*, 412 U.S. at 690-691, 93 S.Ct. 2405. Now, however, unlike the time at which we issued our injunction against the surcharge, the Commission has issued what it at least thought was its final order on the rate increases. And in *Wichita Board of Trade*, decided the same day as *SCRAP*, a majority of the Court stated that the terms of Section 15(7) do not govern a case in which the Commission has issued what it intends to be its final order. 412 U.S. at 820, 826-828, 93 S.Ct. 2367. Moreover, this *Wichita* majority affirmed that District Courts reviewing Commission orders must have at least some power ancillary to their general powers of review and protective of their jurisdiction to enjoin railroads from collecting new charges pending final determination of the suit. Mr. Justice Marshall, writing for four mem-

bers of the majority, noted that while three-judge District Courts are only explicitly given power to enter orders against the Commission by 28 U.S.C. § 2324 (1970),[51] "'judicial review would be an idle ceremony if the situation were irreparably changed [by private parties] before the correction could be made.'" 412 U.S. at 819, 93 S.Ct. at 2381, quoting Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 62 S.Ct. 875, 86 L.Ed. 1229 (1942). Here collection of the recyclable rate increases during the Commission's reconsideration may well cause further irreparable environmental degradation.[52]

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[51] The relief we grant today against the Commission is clearly not called into question by the Court's *SCRAP* or *Wichita* decisions. "Nor does anything in the Court's opinion today deny to the district courts power to enjoin the Commission to comply with NEPA * * * so long as no injunction is issued barring implementation of the rates themselves, *cf.* Atchison, T. & S. F. R. Co. v. Wichita Bd. of Trade, *post*, p. 800 [93 S.Ct. 2367]." United States v. SCRAP, *supra* note 3, 412 U.S. at 724-725 n. 1, 93 S.Ct. at 2436 (opinion of Mr. Justice Marshall).

[52] The railroads argue that this is an inappropriate case to exercise the ancillary power posited by Justice Marshall because the Commission can correct any violations of NEPA without the railroads being enjoined from collecting the increases. This argument reflects a total misunderstanding of NEPA's purposes. To be sure, the commands of NEPA will not change if the railroads collect the increases while the Commission attempts to comply with these commands. But the commands exist to enhance the quality of our environment, not to test agencies' capacity to respond to congressional directives. It is irreparable environmental change with which we must be concerned if our review is to be more than an "idle ceremony."

However, Justice Marshall proceeded to state for the *Wichita* plurality that the considerations which underlay the Court's interpretation of Section 15(7) demand that the courts' ancillary power be limited. Justice Marshall's definition of the ancillary power is critical, for Mr. Justice Douglas, the fifth member of the *Wichita* majority, would detract not at all from the general power of this court to enjoin the railroad,[53] while three other members of the Court argued that District Courts lack any jurisdiction whatever to enjoin rates even after a final Commission order.[54] Justice Marshall stressed that the most important of the considerations underlying the Court's interpretation of Section 15(7) in Arrow Transportation Co. v. Southern R. Co., *supra*, the case primarily relied upon by the *SCRAP* Court, relate to the concept of agency "primary jurisdiction." This concept directs that until the agency has provided its own views a court should demur from expressing a view on matters which have been at least in part entrusted by Congress to an agency's discretion and concerning which the agency has developed some degree of expertise. Before a court issues an injunction pending final determination of a suit, it normally either implicitly or explicitly makes an estimation of the likelihood of ultimate success on the merits of the party challenging the agency action.

[53] 412 U.S. at 826-828, 93 S.Ct. 2367.

[54] 412 U.S. at 838, 93 S.Ct. 2367 (opinion of Mr. Justice White, in which Mr. Justice Brennan and Mr. Justice Rehnquist join, concurring in part and dissenting in part).

See Virginia Petroleum Jobbers Assn v. FPC, 104 U.S.App.D.C. 106, 110, 259 F.2d 921, 925 (1958). The expression of such an estimation may well pronounce the views of the court on matters such as national transportation policy which are within the agency's primary jurisdiction. A court contemplating an injunction pending final determination will further make some weighing of the magnitude and irreparability of the harms which would be suffered by the parties depending on whether an injunction is issued. *Ibid.* This weighing may also require the court to evince its beliefs on matters concerning which the agency being reviewed has primary expertise. The danger that a reviewing court issuing an injunction would thus intrude on the primary jurisdiction of the ICC moved the *Wichita* plurality to state that District Courts should not enjoin rates in order to protect their jurisdiction to review Commission orders unless they entertain "substantial doubt about the consistency of the Commission's action [on the substantive merits] with its mandate from Congress." 412 U.S. at 822, 93 S.Ct. at 2382.

Our uncertainty as to the meaning for this case of Justice Marshall's opinion has a dual origin. First, we question whether issuance of an injunction here would intrude upon the primary jurisdiction of the Commission. The injunction overturned by the *Wichita* Court was issued against the railroads' imposition of separate charges for inspection of grain in transit because the Commission's order approving such charges did not justify departure from a long-

standing rule proscribing them. In issuing the injunction the District Court thus at least implicitly had to express its view that this departure was not justified. Matters of national transportation policy are, of course, within the especial expertise of the Commission; however, we are concerned here with matters of environmental policy and there is no reason to consider the Commission especially expert on the environment. Our issuance of an injunction pending final determination would need only be a statement of our belief that a full consideration of the rate increases' environmental impact will probably lead to a conclusion that those increases must be avoided. Further, Justice Marshall stressed that the injunction in the *Wichita* case was perforce based on a weighing of the injunction's harm to carriers against its benefit to shippers. Not only does this weighing of the interests of carriers and shippers exclusively involve considerations of national transportation policy; it also must be done against the background of Section 15(7) which, by providing for repayment of charges ultimately found to be unreasonable, makes reparable any harms which might accrue to shippers should an injunction not issue. Our issuance of an injunction here would require consideration of environmental degradation for which the Interstate Commerce Act does not and unhappily probably could not provide reparation. We thus question the applicability of Justice Marshall's *Wichita* analysis to this case. Our doubts are augmented appreciably by the fact that Justice Marshall dissented

from the reversal of our first *SCRAP* opinion, advancing the same distinctions of our case from *Wichita* as we have set forth above. *See* 412 U.S. at 724, 728-732, 93 S.Ct. 2405.

But even if the analysis of the *Wichita* plurality is applicable to this case, we do not think it obvious that an injunction against the railroads would be inappropriate. Justice Marshall's *Wichita* opinion recognized that a court need not refrain from granting an injunction and thus stating its views on the merits if the court believes it would have to reverse the agency if it does not change its decision after reconsideration. We indeed do entertain "substantial doubt" about the consistency of the Commission's allowance of the rate increases with the congressional mandate that the Federal Government "use all practicable means" to "approach the maximum attainable recycling of depletable resources." 42 U.S.C. § 4331(b)(6). We indeed might well question whether the Commission can allow the recyclable rate increases without clearly giving "insufficient weight to environmental values." *See* Calvert Cliffs' Coordinating Committee v. USAEC, *supra*, 146 U.S.App. D.C. at 39, 449 F.2d at 1115. Nonetheless, out of an abundance of caution, we decline to consider further granting to plaintiffs additional injunctive relief.

The October 4, 1972 and May 2, 1973 orders are vacated and Ex Parte No. 281 is to be reopened for further proceedings consistent herewith.

So ordered.

FLANNERY, District Judge (dissenting):

The history of this protracted litigation is clearly set forth in the Court's majority opinion. That history reveals that the Supreme Court has on two occasions overruled findings of this Court on jurisdictional grounds.

I

Jurisdiction

On June 18, 1973, the Supreme Court held that this Court was without jurisdiction to issue a preliminary injunction restraining a temporary surcharge on shipping rates for recyclable commodities. The Court reasoned that section 15(7) of the Interstate Commerce Act[1] vested exclusive jurisdiction in the Interstate Commerce Commission to suspend rates, pending a final decision of their lawfulness.[2] On November 19, 1973, the Supreme Court vacated another injunction issued by this Court restraining the Commission and railroads from collecting certain rate increases on recyclable commodities, which the railroads intended to place in effect at the expiration of the statutory suspension period.[3] The case was remanded to this Court for further consideration in

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[1] 49 U.S.C. § 15(7) (1970).

[2] United States v. Students Challenging Reg. Agcy. Pro. (SCRAP), 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973).

[3] United States v. Students Challenging Reg. Agcy. Pro. (SCRAP), —— U.S. ——, 94 S.Ct. 533, 38 L.Ed.2d 326 (1973).

the light of Atchison, Topeka and Santa Fe Railway Co. v. Wichita Board of Trade.[4] These decisions by the Supreme Court clearly require this Court to reconsider its prior holdings and to determine whether it has jurisdiction in this matter.

In *Wichita*, the Supreme Court held that judicial review of Interstate Commerce Commission decisions in rate cases is limited in scope and that such decisions are not to be disturbed unless they are unsupported by evidence, are made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power. Since the Commission in the present case has not yet determined that the rates in question are reasonable, this Court is clearly without jurisdiction to suspend them. Arrow Transportation Co. v. Southern Railway Co.[5] The Supreme Court in *Wichita* also pointed out that Congress, in establishing the Interstate Commerce Commission, had created an administrative agency whose function was to develop an understanding of national transportation problems and to use that expertise to determine what our national transportation policy should permit. Consequently, a court should ordinarily refrain from expressing any view on such policy before the Interstate Commerce Commission expresses its view. For this Court to issue an injunction during an ongoing administrative proceeding would be to undercut the policies served by the doc-

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[4] 412 U.S. 800, 93 S.Ct. 2367, 37 L.Ed.2d 350 (1973).

[5] 372 U.S. 658, 83 S.Ct. 984, 10 L.Ed.2d 52 (1963).

trine of primary jurisdiction, and would slide the Court "unconsciously from the narrow confines of law into the more spacious domain of policy."[6]

It is the established rule that general revenue orders of the Interstate Commerce Commission, such as the suspension orders directed to individual rates in this case, are not reviewable by the courts.[7] The Supreme Court has ruled in this case that N.E.P.A. was not intended to repeal by implication any other statute.[8] There is no indication that Congress intended N.E.P.A. to overrule the long line of judicial decisions holding that general revenue orders, such as those presented in this case, are not reviewable by the courts.

This Court, therefore, clearly does not have jurisdiction to enjoin the collection of the increased rates on recyclable materials. It follows that since the Commission's orders are non-reviewable at this stage,

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[6] Atchison, Topeka and Santa Fe Railway Co. v. Wichita Board of Trade, 412 U.S. at 807, 93 S.Ct. at 2375; Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194, 61 S.Ct. 845, 85 L.Ed. 1271 (1941).

[7] Alabama Power Co. v. United States, 316 F.Supp. 337 (D.D.C.), aff'd by an equally divided court, 400 U.S. 73, 91 S.Ct. 259, 27 L.Ed.2d 212 (1970); Electronic Industries Ass'n v. United States, 310 F.Supp. 1286 (D.D.C. 1970), aff'd per curiam, 401 U.S. 967, 91 S.Ct. 1188, 28 L.Ed.2d 318 (1971); Atlantic City Elec. Co. v. United States, 306 F.Supp. 338 (S.D.N.Y. 1969), aff'd by an equally divided court, 400 U.S. 73, 91 S.Ct. 259, 27 L.Ed.2d 212 (1970).

[8] United States v. Students Challenging Reg. Agcy. Pro. (SCRAP), 412 U.S. 669, 93 S.Ct. 2405, 2418-2419, 37 L.Ed.2d 254 (1973).

this Court is without jurisdiction to grant the relief requested.

II

N.E.P.A.

Assuming *arguendo* that the Court has jurisdiction to review the adequacy of the N.E.P.A. statement submitted by the Interstate Commerce Commission, I find the statement to be sufficient and in substantial compliance with the requirements of N.E.P.A.

The mandates of N.E.P.A. pertain to procedure. Although N.E.P.A. itself creates no substantive rights in citizens to safe, healthful, productive, and culturally pleasing surroundings, the responsible federal agency is required to take these factors into account before commencement of a project. Upper Pecos Ass'n v. Stans.* The record in this case reveals that the Commission gave extensive consideration to the possible environmental impact of increased rates for certain recyclable commodities. The function of this court is not to decide whether it agrees with the Commission's substantive findings but only to decide whether the record reveals that the procedure set forth in N.E.P.A. was followed and whether the Commission has fully and in good faith considered all factors mandated by N.E.P.A. The Commission in my view has substantially complied with the requirements of N.E.P.A. Based on the substantial record

* 452 F.2d 1233 (10th Cir. 1971).

already compiled, to remand for further hearings under N.E.P.A. would require the Commission to conduct a largely ritualistic act.

On November 7, 1973, the Commission reopened its investigation in this case for the purpose of further evaluating, in accordance with N.E.P.A., the environmental effects of increased railroad freight rates and charges on the movements of commodities being transported for the purpose of recycling. The Commission then spent several months preparing a draft statement which was issued on March 13, 1973. After soliciting and receiving the comments of interested persons and agencies the final Impact Statement was released on May 7, 1973. The comprehensive statement anticipates a potential adverse environmental effect stemming from the proposed rate increases but concludes that the increases are justified by the need to insure a viable and efficient railroad system. This Court has already recognized the financial plight of the nation's railroads.[10] The logic of the Commission's conclusion therefore seems unassailable. Moreover, it is buttressed by extensive findings which cover in detail the five categories set out in § 102 (a)-(c) of N.E.P.A. The Commission has clearly taken the "hard look" at possible environmental consequences mandated by Congress. National Resources Defense Council v. Morton.[11]

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[10] Students Challenging Reg. Agcy. Pro. (SCRAP) v. United States, 353 F.Supp. 317, 323-324 (D.D.C. 1973).

[11] 148 U.S.App.D.C. 5, 16, 458 F.2d 827, 838 (1972).

Finally, the fact that the Commission's final impact statement was filed after the rates had been initially approved does not establish *per se* that the statement was biased and not issued in good faith. All that is required is that the agency make a reasonable good faith effort to comply with the procedural requirements of N.E.P.A. That the statement may have been prepared after the decision to proceed had already been made is not a fatal procedural error requiring the process to begin all over again. Jicarilla Apache Tribe v. Morton, 471 F.2d 1275, 1280 (9th Cir. 1973); Upper Pecos Ass'n v. Stans, 452 F.2d 1233, 1237 (10th Cir. 1971); City of New York v. United States, 344 F. Supp. 929 (E.D.N.Y. 1972).

Even assuming technical non-compliance with N.E.P.A., if the Commission has considered all relevant environmental factors and has reached a fair and informed decision under N.E.P.A. its finding should not be set aside. First National Bank of Homestead v. Watson, 363 F.Supp. 466 (D.D.C. 1973).

For the foregoing reasons, I respectfully dissent and would hold that the motions of the plaintiffs and intervening plaintiffs for summary judgment and for injunctive relief be denied, the case be dismissed, and judgment be rendered for the defendants with normal costs.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 971-72

[Filed Feb. 19, 1974, James F. Davey, Clerk]

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), PLAINTIFF

and

COUNCIL ON ENVIRONMENTAL QUALITY, INVOLUNTARY PLAINTIFF

and

ENVIRONMENTAL DEFENSE FUND, NATIONAL PARKS AND CONSERVATION ASSOCIATION and IZAAK WALTON LEAGUE OF AMERICA, PLAINTIFF-INTERVENORS

and

NATIONAL ASSOCIATION OF SECONDARY MATERIALS INDUSTRIES, INC., COMMERCIAL METALS CO., I. V. SUTPHIN CO. and FRANKEL BROTHERS & CO., INC., PLAINTIFF-INTERVENORS

and

INSTITUTE OF SCRAP IRON AND STEEL, INC. and JULIAN C. COHEN SALVAGE CORPORATION, PLAINTIFF-INTERVENORS

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, DEFENDANTS

and

THE ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL., DEFENDANT-INTERVENORS

JUDGMENT

This case came on for hearing on plaintiffs' and defendants' cross-motions for summary judgment. Briefs were filed herein by the parties. The court has this day filed its opinion. On consideration thereof,

It is ORDERED that the Interstate Commerce Commission's orders of October 4, 1972 and May 2, 1973 in Ex Parte 281 are vacated and this case is remanded to the Commission for further proceedings consistent with the opinion in this case.

/s/ J. Skelly Wright
J. SKELLY WRIGHT
United States Circuit Judge

/s/ Charles R. Richey
CHARLES R. RICHEY
United States District Judge

District Judge Flannery dissents from the foregoing judgment.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 971-72

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), PLAINTIFF

and

COUNCIL ON ENVIRONMENTAL QUALITY, INVOLUNTARY PLAINTIFF

and

ENVIRONMENTAL DEFENSE FUND, NATIONAL PARKS AND CONSERVATION ASSOCIATION and IZAAK WALTON LEAGUE OF AMERICA, PLAINTIFF-INTERVENORS

and

NATIONAL ASSOCIATION OF SECONDARY MATERIALS INDUSTRIES, INC., COMMERCIAL METALS CO., I. V. SUTPHIN CO. and FRANKEL BROTHERS & CO., INC., PLAINTIFF-INTERVENORS

and

INSTITUTE OF SCRAP IRON AND STEEL, INC. and JULIAN C. COHEN SALVAGE CORPORATION, PLAINTIFF-INTERVENORS

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, DEFENDANTS

and

THE ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL., DEFENDANT-INTERVENORS

NOTICE OF APPEAL

1. Notice is hereby given that the Interstate Commerce Commission, one of the defendants in the above-entitled action, hereby appeals to the Supreme Court of the United States from the opinion and judgment of this Court dated February 19, 1974. This appeal is taken pursuant to 28 U.S.C. § 1253.

2. The entire record in this action is hereby designated for certification by the Clerk of the District Court to the Clerk of the Supreme Court. The Clerk of the District Court is requested to prepare and to transmit the entire record to the Clerk of the Supreme Court.

This 19th day of April, 1974.

/s/ Charles H. White, Jr.
CHARLES H. WHITE, JR.
Attorney
Interstate Commerce Commission
Washington, D. C. 20423

FRITZ R. KAHN
General Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 971-72

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), PLAINTIFF

and

COUNCIL ON ENVIRONMENTAL QUALITY, INVOLUNTARY PLAINTIFF

v.

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, DEFENDANTS

NOTICE OF APPEAL

Notice is hereby given on this 19th day of April 1974, that the United States of America hereby appeals under 28 U.S.C. 1253 and 2101, to the United States Supreme Court from the judgment and opinion of this Court filed on February 19, 1974, in favor of plaintiffs against the defendants, vacating Interstate Commerce Commission's orders of October 4,

1972, and May 2, 1973, in Ex Parte 281 and remanding the matter to the Commission.

/s/ William M. Cohen
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APPENDIX D

EX PARTE NO. 281

INCREASED FREIGHT RATES AND CHARGES, 1972

Decided September 27, 1972

REPORT OF THE COMMISSION

BY THE COMMISSION:

BACKGROUND

By our prior report and order in this proceeding, *Increased Freight Rates and Charges, 1972*, 340 I.C.C. 358, entered December 21, 1971, we instituted a nationwide investigation into the adequacy of railroad freight rates and charges, and all railroads in the United States were made respondents. The investigation specifically included (a) a general increase by surcharge of 2.5 percent on bills for freight services (more particularly described in the above referenced report and order and in appendixes A and B thereto) which, by order served February 1, 1972, we permitted to become effective without suspension on February 5, 1972, subject to certain conditions including a requirement that the surcharge schedules expire on June 5, 1972, and (b) a general increase in rates and charges to be applied on a selective basis and which respondents indicated would be filed to supplant the surcharge. For the 4-month period

prior to its then effective expiration date of June 5, 1972, the latter increase was expected to yield additional revenue in the amount of $82 million allocated as follows: $31 million—eastern district, $14 million—southern district, and $37 million—western district.

On February 28, 1972, respondents sought permission to file and make effective on April 1, 1972, a tariff containing their selective increase proposal. By order served March 6, 1972, the requested permission was granted subject, however, to a requirement that it be filed to become effective not earlier than May 1, 1972, upon not less than 45 days' notice to the public. In accordance with that permission, respondents filed, on March 17, 1972, a selective increase tariff (designated as X-281-A) to supplant the surcharge (X-281). The level of increases therein varies between different commodities and services and between and within different territories from 0 to 10 percent; and, if fully applied, respondents anticipate a 4-percent increase in total freight revenues (or $489 million) over the presurcharge (X-267-B) level, allocated as follows: $185 million—eastern district, $72 million—southern district, and $232 million—western district.

Both the surcharge and the selective increase proposals were made subject to a provision for refunds in the event the Commission ultimately finds that no increase or a lesser increase is warranted; and, pursuant to our order of August 13, 1970 (Procedures Governing Rail Carrier General Increase Proceedings, 49 CFR 1102), respondents' initial petitions were accompanied by verified statements containing "the full and entire evidential case" relied on in support of each increase proposal.

In accordance with procedural schedules established in our orders of December 21, 1971, and March 6, 1972, numerous protests and verified statements in opposition were filed by various interested parties. Respondents filed reply verified statements, and oral hearings for cross-examination were held at Washington, D.C., beginning on March 23 and extending to April 20, 1972.

Based upon preliminary consideration of the evidence and arguments of the parties, we entered an order on April 24, 1972, suspending the selective increase proposal (tariff X-281-A and supplements thereto) in its entirety for the full 7-month period allowed by statute, or to and including November 30, 1972; and the investigation was continued. At the same time, we extended the expiration date of the surcharge tariff from June 5 to November 30, 1972.

Pursuant to our order of May 23, 1972 (served on May 24, 1972), all interested parties were invited to participate in oral argument be-

fore the entire Commission and to file briefs either supplemental to or in lieu of oral argument. In response to that order numerous briefs were filed on or before June 12, 1972, and oral argument was held on June 15 and 16, 1972.

The record before us, including written submissions and transcripts of oral hearings and oral argument, is of massive proportions and reflects the views of virtually every interest affected by the involved nationwide general freight rate increase proposals. Careful and individual attention has been given to each of those views[1] and, to the extent feasible, will be reflected in subsequent sections of this report. Due and timely execution of our functions, however, imperatively and unavoidably requires omission of the administrative law judge's report and recommended order.

Revenue Need

General.—The financial condition of the Nation's railroads has been a matter of continuous and grave concern to this Commission charged as we are with administering the Interstate Commerce Act so as to develop, coordinate, and preserve, under private ownership, a national transportation system adequate to meet the needs of the commerce of the United States. Most recently, we exhaustively reviewed and analyzed the overall revenue situation of the railroad industry in the context of general increase tariffs X-265 through X-267-B. See report served on March 23, 1971, in *Increased Freight Rates, 1970 and 1971*, 339 I.C.C. 125, hereinafter sometimes referred to as the prior case. We there concluded:

> that the financial condition of the railroad industry as a whole, and the financial status of many individual carriers by rail, must be found to be at a dangerously low level. The precipitous decline in working capital and serious loss of liquidity has reduced many carriers to a truly marginal operation. This has been most clearly demonstrated by the recent bankruptcy application of the Penn Central. We think it undeniable that a number of other roads are approaching a similar financial crisis. (Prior report, page 173.)

We further found that revenues which the railroads could reasonably expect to receive from rates established at the Ex Parte No. 265 level would enable them to do little more than meet added costs of

[1]Including late-filed verified statements: (1) of the Western Wood Mouldings and Millwork Producers, and (2) of Grande Anse Peat Moss Co., Ltd., Conrad Fafard, Inc., and Annapolis Valley Peat Moss Co., Ltd.

operation in 1970 and 1971 at present levels of service; and that revenues realized from authorized Ex Parte No. 267 increases were necessary to enable the carriers to improve severely depressed earning ratios, and thereby to enhance their ability to attract investment capital for use in upgrading their equipment and facilities.

INCREASED COSTS

Justification for the increases here proposed is based on operating cost increases not anticipated in the prior case. In effect, respondents claim that additional revenues obtained from the sought selective increases will not improve their capital base but, rather, will enable them to offset, in part, currently prevailing annualized cost levels[2] for wages and other employee benefits (including increases effective April 1, 1972), materials, supplies, State and local taxes, and additional specified items. Evidence relating to those increased costs is set forth below.

Wages.—Wage cost increases in 1971 resulted from agreements executed with nearly all rail unions providing for periodic increases in wage rates during the period January 1, 1970, to June 30, 1973.[3] The general pattern of these wage increases was established in November 1970 by Emergency Board No. 178 following its investigation of wage disputes involving four unions, viz, the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC), the Brotherhood of Maintenance of Way Employees (BMWE), the Hotel and Restaurant Employees and Bartenders International Union (H&RE) and the United Transportation Union (UTU). The board recommended increases in wage rates as follows:

January 1, 1970	5 percent
November 1, 1970	32 cents per hour
April 1, 1971	4 percent
October 1, 1971	5 percent
April 1, 1972	5 percent
October 1, 1972	5 percent

[2] Following the methodology accepted in the prior case, estimates of increased costs (except where otherwise indicated) are for a full 12-month period for all class I railroads and are based on an employment level 3.14 percent below the 1970 level and traffic at the same level as in 1970. So stated, these increases are not necessarily the same as the increases in calendar year 1971 over calendar year 1970, as the latter comparison would involve different levels of employment and would be affected by the timing of the various increases. Also, a showing of cost increases limited to only a portion of the calendar year during which they became effective would fail to indicate fully their continuing impact.

[3] Wage increases scheduled under these agreements to become effective after April 1, 1972, are not reflected in respondents' cost computations and they will not be considered herein.

This pattern was followed in subsequent legislation and agreements. Public Law 91-541, enacted December 10, 1970, to terminate a strike, made the recommended 1970 increases effective for employees represented by the BRAC, BMWE, H&RE, and UTU. The recommended increases for 1970, 1971, and 1972 were subsequently incorporated into agreements reached with the following unions:

BMWE—February 10, 1971
H&RE—February 10, 1971
BRAC—February 25, 1971
UTSE (United Transport Service Employees)—March 24, 1971
ATDA (American Train Dispatchers Ass'n.)—April 20, 1971
RYA (Railroad Yardmasters of America)—April 23, 1971
BLE (Brotherhood of Locomotive Engineers)—May 13, 1971

The same pattern of wage increases in 1970 and 1971 was embodied in final agreements reached with the UTU on January 27, 1972, and with the International Brotherhood of Firemen and Oilers (BFO) on February 11, 1972.

Agreements reached with four shopcraft unions and ratified November 13, 1971, differ only slightly from the established pattern insofar as 1971 wage increases are concerned. These agreements (with the International Association of Machinists and Aerospace Workers; International Brotherhood of Electrical Workers; International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths; Forgers and Helpers; and Brotherhood of Railroad Carmen of the U.S.A. and Canada) provide increases of 10 cents per hour effective January 1, 1971, 15 cents per hour for mechanics and higher rated employees and 8 cents per hour for others effective April 1, 1971, and the 5-percent pattern increase October 1, 1971.

Agreement reached November 16, 1971, ratified November 24, 1971, with the Brotherhood of Railroad Signalmen of America provides for wage increases in 1971 in conformity with the pattern of the shopcrafts' agreement.

Respondents' cost calculations for wages assume application of the shopcrafts' settlement to two shopcraft disputes not yet settled (representing about 1 percent of all employees) and application of the general increases of 4 percent April 1, 1971, 5 percent October 1, 1971, and 5 percent April 1, 1972, to all other employees.

Thus calculated, based on an employment level 3.14 percent below that of the year 1970, wage increases effective January 1 and April 1, 1971, represent payroll costs of $253 million a year, and the

October 1, 1971, and April 1, 1972, increases involve annual costs of $305 and $320 millions, respectively. Also, actual wage increases in 1970 are shown to have exceeded estimates relied upon in the prior case by $271 million.

Additional cost increases in wage-related items include $63 million annually in payroll taxes resulting from a statutory increase (from $650 to $750) in the maximum amount of monthly pay subject to tax for retirement and medicare, and a $99-million increase annually in health and welfare expense, became effective March 1, 1972. The latter represents the increased cost of renewal of the existing group policy contract, plus $1.22 monthly per covered employee for added benefits, as agreed to in a Memorandum of Understanding between representatives of the carriers and their employees signed on December 10, 1971.

Other Cost Increases

Based on a relationship of the consumption of fuel, materials, and supplies in 1970 adjusted to the first half of 1971 freight traffic volume at the 1971 price index, respondents estimate that as of July 1, 1971, prices for those items increased over average price levels for 1970 at a rate equivalent to $134 million annually. By applying the January 1972 price index in a similar manner, increases occurring during the last half of 1971 were estimated to be $47 million, an amount which, when compared to the first half, represents a substantial decrease in the rate of inflation resulting in large measure from the price freeze in effect after August 14, 1971.

Also included in respondents' computations of increased 1971 expenses are the following amounts: $35 million for freight loss and damage, payments for personal injuries, insurance, and pensions; $7 million for depreciation and retirement charges; $1 million representing State and local taxes; $74 million for equipment rents; and $10 million for fixed and contingent charges. These amounts were computed on a calendar year basis with adjustments being made for the leveling-off effect of the August 14 freeze.

The increased costs noted about are summarized and subdivided by major districts in the following table.

TABLE I

Items of cost escalation class I railroads

Item	Annual costs in millions			
	United States (1)	Eastern district (2)	Southern district (3)	Western district (4)
1. Wage rates and prices—prior to Aug. 15, 1971:				
2. Excess cost of 1970 wage increases (in excess of the 7 percent for which costs were submitted XP 265 for employees other than shopcrafts)	$271	$109	$42	$120
3. Wage increases, Apr. 1, 1971 (including Jan. 1, 1971 increases for shopcrafts and signalmen)	253	102	39	112
4. Increase in material prices, July 1971 over 1970 average	134	48	25	61
5. Subtotal (lines 2+3+4)	658	259	106	293
6. Wage rates, wage supplements, and prices—after Aug. 15, 1971:				
7. Wage increases, Oct. 1, 1971	305	123	47	135
8. Wage increases, Apr. 1, 1972	320	129	50	141
9. Payroll tax increase, Jan. 1, 1972	63	26	10	27
10. Health and welfare, increase in contribution, Mar. 1, 1972	99	41	15	43
11. Increase in materials prices, January 1972 over July 1971	47	23	8	16
12. Subtotal (lines 7 to 11)	834	342	130	362
13. Other increases since XP 265-267 (calendar year basis):				
14. Loss and damage, personal injuries, insurance, and pensions	35	33	(2)	4
15. Depreciation and retirement charges	7	(3)	8	2
16. State and local taxes	(1)	(6)	4	1
17. Equipment rents	74	38	17	19
18. Fixed and contingent charges	10	(3)	5	8
19. Subtotal (lines 14 to 18)	125	59	32	34
20. Total (lines 5+12+19)	1,617	660	268	689

Our review and analysis of respondents' underlying worksheets indicates the above data to be accurate and reliable with the exception noted immediately below.

In developing the cost of wage increases, respondents based such increases on the level of employment for the year 1970 reduced by 3.14 percent to reflect the first half of 1971 employment level. They should also have recognized that the 3.14-percent change in employment levels would result in a corresponding reduction in total labor costs as compared to the actual 1970 expenses. Those expenses totaled $4,620 million. Therefore, the 3.14-percent reduction would amount to $145 million.

In addition respondents should have reduced the $320-million wage increase effective in April of this year to $310 million to reflect a similar decrease in employment for the current year. The development of annualized cost increases of $63 million for payroll taxes and $99 million for health benefits have also been overstated by $2 million and $3 million, respectively, because of respondents' failure to recognize a decrease in employment for the current year.

These adjustments, in sum $160 million, reduce the total amount of cost increases in the table above to $1,457 million nationwide and to $594 million in eastern district, $244 million in southern district, and $619 million in western district; and, so adjusted, we find that they correctly depict the total annualized increases in costs faced by the Nation's railroads since closing of the record in the prior case.

Revenue Yield

Estimates of additional revenues to be obtained from the surcharge and the supplanting selective increases were computed in the same manner as in the prior case. Accordingly, they are based upon revenue ton-miles experienced by the carriers during the first 6 months of 1971 projected to reflect the entire year and multiplied by the average revenue received during the second and third quarters of 1971 at the X-267-B level. The resulting total revenue estimate for 1971 is then multiplied separately by factors of 2.5 and 4 percent representing, respectively, the surcharge increase and the average increase under the selective increase tariff to show amounts of revenue yield assuming both proposals were fully applied.[4] This "theoretical" return is reduced by the 82-percent effectiveness factor utilized in the prior report to reflect probable actual yield in

[4]The surcharge increase on lumber and lumber articles is subject to a 2 cents per hundredweight maximum which reduces its revenue yield by an estimated $8 million, or by $1 million in eastern, less than $0.2 million in southern, and $7 million in western district.

light of experience in application of previously authorized general increases. Respondents' calculations, nationwide and by major districts, are set forth in the following table:

TABLE 2

Railroads development of estimated revenue yield

Item	United States	Eastern district	Southern district	Western district
1. Revenue ton-miles, Jan.-June 1971 (millions)	382,871	124,856	71,611	186,404
2. Percent first half of annual ton-miles (based on experience in most recent 4 years	50.0	50.6	50.6	49.4
3. Estimated annual ton-miles (millions) (line 1 + line 2)	765,000	247,000	141,000	377,000
4. Average revenue per ton-mile, 2d and 3d quarters (X-267-B level)---(cents)	1.597	1.825	1.466	1.503
5. Annual freight revenues (millions) (line 3 x line 4)	$12,241	$4,508	$2,067	$5,666
6. Yield of full surcharge (2.5 percent x line 5, less lumber adjustment)	$299	$112	$52	$135
7. Average percent of selective increases	4.0	4.1	3.5	4.1
8. Yield full selective increases (line 7 x line 5)	$489	$185	$72	$232
9. Adjusted yield surcharge (line 6 x 0.82)	$246	$92	$43	$111
10. Adjusted yield of selected ubcreases (line 8 x 0.82)	$401	$152	$59	$190

These forecasts, in our opinion, are adequately supported and reasonably reliable, having in mind that estimates of the type involved, at best, are pragmatic and subject to many unforeseen contingencies.

While the past experience upon which use of the 82-percent reduction factor was predicated in the prior case may not recur as to the surcharge because of tis relatively low level and generally uniform application, we believe use of that factor results in a reasonable approximation of the revenue actually derived from the surcharge for another reason. In this respect, we note that the surcharge will have been in effect much less than a full 12-month period and was made inapplicable to recyclable materials after July 16, 1972, by virtue of a court order.[3]

Also, we have accepted the 82-percent adjustment applied to the selective increase proposal since any presumption that, due to its "selectiveness," experience thereunder will differ materially from

[3]See discussion under the caption "Environmental considerations," infra.

prior single-level general increases is dissipated by virtue of the fact that wholesale exceptions and flagouts by individual lines have already occurred and are continuing, a circumstance which will be commented on in a subsequent section of this report.

Accordingly, we find that the surcharge will yield appreciably less than $246 million during the limited period of its applicability and that the selective increases, *assuming* complete approval, would return $401 million as a maximum amount. The latter amount represents approximately 28 percent of the $1,457 million in increased cost levels found to have occurred since the record was closed in the prior case. The following table depicts this summary and contains a similar breakdown by major districts:

TABLE 3

Annualized	United States	Eastern district	Southern district	Western district
		(*millions*)		
Yield of surcharge	$246	$92	$43	$111
Yield of selective increases	401	152	59	190
Total cost escalations	1,457	594	244	619

We emphasize, however, that the actual revenue obtained from the selective increase tariff will be significantly less than the maxima indicated above due to anticipated further voluntary flagouts by individual lines, to delay in implementing corresponding intrastate increases, and to an overall limitation and specific exceptions and holddowns which we have found necessary to impose in order adequately to protect the public interest and preserve a lawful rate structure.

FINANCIAL CONDITION

Are the railroads in a position to absorb an even greater portion of their increased costs? In our judgment, based on the following analysis, a requirement that they do so would impair their already weakened financial structure and jeopardize their ability to provide essential services.

Composite financial data for all class I railroads and by major districts is contained in appendix A. In assessing their overall

condition, we shall focus upon six areas: working capital and maturing debt; equipment obligations; interest charges and equipment rents; capital expenditures and cash flow; net earnings and rate of return; and margin of earnings.

1. *Working capital and maturing debt.*—Net working capital of class I railroads, excluding the effect of long-term debt due within 1 year, amounted to $15 million on December 31, 1971, as compared with $109 million at year's end 1970, and $636 million on December 31, 1965. As reflected in the following territorial statistics, the eastern roads had a working capital deficit of $104.5 million.

	Net working capital	Long-term debt due within 1 year
Eastern district	($104.5)	$219.1
Southern district	90.7	162.3
Western district	28.9	249.4

If long-term debt due within 1 year were included in the railroads' current liabilities, as is the case outside the surface transportation industry, all three districts would show large working capital deficits. In our opinion, the foregoing statistics reflect a situation which cannot be lightly regarded in terms of the railroads' overall liquidity position and capacity to maintain orderly operations. See table 1, appendix A. It should be recognized, however, that we are dealing with totals and to infer from these statistics that all or even a majority of railroads have working capital deficits or lack sufficient working capital would be highly improper and unfounded. For example, the eastern district deficit was produced primarily by four roads, Erie Lackawanna, Pennsylvania-Reading-Seashore, Reading and Penn Central who had working capital deficits of $23.7 million, $8.5 million, $7.6 million and $53.7 million, respectively, as of December 31, 1971. Those amounts account for approximately 89 percent of the $104-million working capital deficit in the eastern district.

2. *Equipment obligations.*—The data contained in table 2, appendix A shows an almost two-fold increase in equipment obligations outstanding over a 10-year period 1960 through 1970 and marks a substantial effort of class I railroads in all districts to acquire badly needed rolling stock under difficult financial conditions. At year's end 1960, total equipment obligations

outstanding were $2.69 billion. At year's end 1970, by comparison, obligations outstanding aggregated about $4.4 billion. During that period, interest rates on these obligations nearly doubled, evidencing unfavorable market conditions. In 1960, interest rates on equipment obligations issued that year were about 4.6 percent while, in 1970, the comparable average interest rate approached 8.8 percent.

3. *Interest charges and equipment rents.*—The combination of greater debt and high interest rates has caused interest charges of class I railroads to increase from $398 million in 1966 to $561 million in 1971. In addition, net rents paid by the railroads for use of equipment owned by others increased even more. Combined, these charges increased from $891 million in 1966 to $1,377 million in 1971. Table 3, appendix A. Considered together with other indicia of respondents' financial condition, these increases have placed great strain on the railroad industry.

4. *Capital expenditures and cash flow.*—For many years, the railroads' capital needs for replacement and modernization of facilities have been far greater than their ability to acquire new capital either from internal or external sources. This has been a principal, but not the sole[6] factor behind the decline in capital expenditures shown in table 4, appendix A, with respect to eastern and western districts. In 1966, for example, industrywide expenditures totaled almost $2.0 billion, a decrease of about $800 million. In every year since 1962, the capital expenditures of class I roads have exceeded cash flow from operations by considerable amounts. Unable to finance their expenditures through internally generated funds, the railroads have had to rely principally upon borrowing to meet their capital needs. Under these circumstances, however, the railroads' ability to incur additional debt is severely limited without a substantial improvement in earnings. Without adequate capital to purchase new equipment deficiencies in service to shippers will be unavoidable.

5. *Net earnings and rate of return.*—Data contained in table 5, appendix A shows that net railway operating income of class I railroads increased from a critically low level of $486 million in 1970 to $698 million in 1971, an improvement attributable principally to the rate increases authorized in the prior case. Notwithstanding this marked improvement, 1971 earnings remained far below the $1,046 million in net railway operating income earned in 1966.

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[6]Other influential factors have been increased reliance upon leasing equipment and the takeover of passenger service by Amtrak.

Despite the beneficial effects of the 1971 rate increases, the class I railroads' return on net worth remains very low in comparison with rates earned by other industries. For example, in 1970, the class I railroads' rate of return on net worth of 1.3 percent ranked 69th, or next to last, among all industries listed in annual rate of return statistics published by the First National City Bank of New York.

In light of these statistics, respondents contend that without the increases sought in this proceeding, their net earnings and rate of return would again plummet as a result of a continuing escalation of costs. Whether that result would necessarily follow is at best uncertain at this point in time but, it is clear that the income derived from the surcharge hardly scratches the surface in terms of developing a level of railroad profitability that will permit the kind of return on capital enjoyed in other sectors of the economy.

The exact effect of the selective increases in the present environment is difficult to ascertain. In this connection, we are referring to the general economic climate that will prevail during 1972; the labor demands during the year; the Government's decisions regarding fiscal and monetary policy; price-wage control policies; and last, but certainly not least, what the railroads will do to improve their overall situation.

However, based on our restated expense increases, it can be reasonably assumed that increases averaging 4 percent would have a very nominal effect. In this respect, we note that $401 million is the maximum additional revenue which respondents could expect if the selective increases were approved in full. This represents 3.8 percent of their annual revenue based on January through June 1971 revenue adjusted to the Ex Parte No. 267-B level. The estimated impact of this increase on their rate of return, considering increases in wage and fringe benefit costs up to April 1, 1972, and all other costs through the end of 1971, would be as follows:

	United States	District		
		Eastern	Southern	Western
	Percent	*Percent*	*Percent*	*Percent*
Without increase				
Return on net investment	(1)	(2.8)	1.6	2.0
Return on equity	.1	(5.4)	2.7	3.1
With increase				
Return on net investment	1.1	(1.8)	2.4	3.1
Return on equity	1.9	(3.4)	4.0	4.9

[1]Less than 0.1 percent.

It should be noted that even with the sought additional revenue respondents' rate of return on net investment, both nationwide and by major districts, will be less than in 1971. See table 5 of appendix A.

By comparison, revenue needs based on 6- and 8-percent rates of return on net investment[7] would be as follows:

Return	Percentage rate increase	Additional revenue
Percent	*Percent*	*Millions*
6	15.8	$1,556.0
8	24.1	2,366.1

Although a 15.8-percent increase would be required to produce an overall return in the United States of 6 percent, this would not provide sufficient revenue for the eastern district and would provide a return in excess of 6 percent for the southern and western districts. To provide a 6-percent return on net investment by districts, the following freight rate percentage increases would be needed.

	Percent
United States	15.8
Eastern district	25.1
Southern district	10.8
Western district	10.0

The revenue needs based on 8-, 10-, and 12-percent rates of return on shareholders' equity are as follows:

Return	Percentage rate increase	Additional revenue
Percent	*Percent*	*Millions*
8	18.6	$1,833.4
10	23.5	2,313.2
12	28.4	2,793.0

[7]Equally applicable here is our statement in the prior case: "* * * Our use of these rates of return in this discussion is not to be taken as an indication that rates of return of 6 percent on net investment or 8 percent on net worth represent the maxima under present conditions, but rather, that they represent the rates of return which the respondents must make every effort to attain if they are to be in a position to provide the improved services which will be needed in the future." (339 I.C.C. 125, 182).

While an 18.6-percent increase would produce an overall return of 8 percent on shareholders' equity in the United States, the return would again be lower in the eastern district and higher in the southern and western districts.

To provide a return of 8 percent on shareholders' equity by districts, the following freight rate percentage increases would be needed:

	Percent
United States	18.6
Eastern district	27.0
Southern district	14.6
Western district	13.2

This again illustrates the magnitude of the revenue requirements for the eastern district compared to the southern and western districts, which are approximately 24 and 59 percent, respectively, of the eastern and western district needs.[8]

Equity yield to return on net investment.—A comparison of the return on shareholders' equity would produce the following returns on net investment of railroads in the United States.

Percent return on equity	Produces return on investment	Additional revenue requirements
Percent	*Percent*	*Millions*
8	6.7	$1,833.4
10	7.9	2,313.2
12	9.0	2,793.0

6. *Margin of earnings.*—As reflected in table 6, appendix A, the percent of revenues carried down to net operating income after

[8]In developing the amount of additional revenue required to earn selected rates of return on net investment and shareholders' equity, we have recognized effective Federal income tax rates of 24 percent in eastern district, 40 percent in southern district, and 33 percent in western district; and we have used the 82-percent factor to determine the actual yield that can be expected. The net investment base was derived from I.C.C. Annual Report Form A, excluding balances of accounts 80 ("Other elements of investment") and 90 ("Construction work in progress"). The effect of the exclusion is very small and has no significant effect. Compare, *Increased Freight Rates, 1968*, 332 I.C.C. 590, 604-605. We have not recognized savings generated by Amtrak which would aggregate to about 2.5 percent or less than $20 million. From a logical viewpoint, Amtrak should have very little effect, if any, on any freight expenses. Under the agreement signed by the participating railroads the railroads will be reimbursed for their solely related passenger expenses plus 5 percent or they can be reimbursed on a supported avoidable cost basis.

fixed charges has fallen from 5.5 percent in 1966 to 0.5 percent in 1971. This table, in our opinion, further illustrates the manner in which rising costs have outpaced revenues in recent years. During 1971, for example, class I railroads, combined, had a net operating income of only $65.8 million after fixed charges and before dividend payments, up from a deficit of $133.5 million in 1970.

Other considerations.—In light of the above analysis, we find no merit in the views of certain protestants who argue, in effect, that respondents should be required in this proceeding to absorb all cost increases. Our restatement of total cost increases which have occurred subsequent to our decision in the prior case recognizes an increase in productivity by reducing the related wage cost items by 3.14 percent to reflect a continuous decline in the railroad employment levels; and those cost increases, aggregating $1,457 million, greatly exceed the maximum amount of additional revenue which respondents could possibly obtain even if the sought increases were approved in full. Of necessity, they will have to exert maximum effort to effect greater increases in productivity.

In this respect, considerable progress has been made by the railroads. For example, gross ton-miles per employee hour paid have increased from 1,097 in 1966 to 1,234 for the year 1970. During the same period the average payroll cost per employee was increasing 30.4 percent from $7,734 to $10,085 and the payroll cost per 1,000 gross ton-miles was increasing 16.3 percent from $2.89 to $3.36. Those increases occurred while the total number of employees was decreasing 10.2 percent from 630,894 to 566,282 and gross ton-miles were showing only a 0.7 percent increase from 1,689 billion to 1,701 billion during the same period.

Various protestants also contend that the several "sick" lines in the East should not be used in constructing composite or average financial data for eastern district carriers or for railroads generally. Deficit lines, however, are part of an interrelated and interdependent railroad system; and in proceedings of this type we must consider the needs of the carriers as a whole or at least by major territorial groupings.[9] An attempt to assist individual railroads

[9]The paramount importance of a "system" approach was emphasized in 1970 when the continued operation of the Penn Central was in serious doubt. See House Report on Emergency Rail Services Act of 1970 (H.R. 91-1770), 1970 Cong. and Adm. News, p. 5985, *et seq.*, as follows: "The efficient movement of freight by rail is dependent upon all parts of the system functioning as a unit. The malfunction of any part can disrupt the entire system. The Penn Central affords a prime example of the interdependency of the system. It interchanges with 164 railroads at 1,088 points. Many west coast products move to eastern distribution or processing centers served exclusively by the Penn Central.

(footnote continued on next page)

in financial distress by authorizing them to take higher increases than those permitted more fortunate lines competing in the same territory would be self-defeating. The "favored" carriers would have a Hobson's choice of either foregoing the higher increases or losing traffic to competitors with lower rates.

But apart from that practical problem, any implication that, absent data from deficit lines, the sought increases will be excessive for railroads generally or for the majority of carriers operating in the eastern district is misplaced. The average rates of return of those other carriers would rise slightly but would nevertheless remain at a depressed level when compared with return rates enjoyed in many other industries.

The following table illustrates how exclusion of the major deficit line (Penn Central) would effect the percentages and amounts of increase needed to achieve the rates of return indicated.

TABLE 4

Including Penn Central			Excluding Penn Central	
Rate of return	Percentage increase	Additional revenue	Percentage increase	Additional revenue
Percent		*Millions*		*Millions*
		Based on net investment—United States		
6	15.8	$1,556.0	13.3	$1,099.7
8	24.1	2,366.1	21.8	1,794.0
		Based on shareholders' equity—United States		
8	18.6	1,833.4	15.9	1,312.1
10	23.5	2,313.2	20.9	1,726.1
12	28.4	2,793.0	26.0	2,140.1
		Based on net investment—eastern district		
6	25.1	933.8	20.4	477.5
8	32.7	1,217.2	27.6	645.0
		Based on shareholders' equity—eastern district		
8	27.0	1,003.9	20.7	482.7
10	31.0	1,153.9	24.3	566.9
12	35.0	1,304.0	27.9	651.1

(footnote 9 continued)

. . . . . .

It is clear that the maintenance of a sound rail transportation system and a healthy national economy is dependent upon continued performance of essential rail service by all segments of the system."

Price stabilization.—In accordance with the Economic Stabilization Program and with rules and regulations promulgated thereunder by this Commission (pursuant to approval of the Price Commission) in Ex Parte No. 280, *Special Procedures for Tariff Filings Under the Wage and Price Stabilization Program*, by our order of July 13, 1972 (49 CFR 1311.0-1311.4), we find:

1. That the former or existing rate level is the Ex Parte No. 267-B rate level in effect prior to February 5, 1972. The proposed selective increases range from 0 percent to a maximum of 10 percent and will average 4 percent. The selective proposal is in lieu of and not in addition to the 2.5-percent surcharge increase which became effective February 5, 1972;

2. That the maximum dollar amount of increased revenue the proposal would provide (if fully applied and absent limitations and holddowns later required herein) is $401 million, allocated as follows: $152 million—eastern district, $59 million—southern district, and $190 million—western district;

3. That the above additional revenue is less than the amount of cost increases actually experienced by the carriers during 1971 and, therefore, no increase in railroad net operating income as a percentage of total operating revenue is expected;

4. That no increase in the railroads' overall rate of return on capital is expected for the reason stated in (3) above;

5. That the increase proposal is cost justified and does not reflect future inflationary expectations. In this respect, we further find that cost increases resulting from negotiated contracts for wages and fringe benefits are not "anticipated or speculative." Rather, they are firm cost increases that the industry will have to pay;

6. That the additional revenue to be derived from the increase proposal can be considered at best only a partial fulfillment of the railroads' revenue requirements, and in that sense will return a minimum amount required to assure continued, adequate, and safe service or to provide for necessary expansion to meet future requirements for transportation services;

7. That within the context stated in (6) above, the increase proposal will achieve the minimum rate of return needed to attract capital at reasonable costs and not impair the credit of the railroads;

8. That the labor costs upon which the proponents rely fall into two categories. Wage contracts affecting approximately 94 percent of railroad employees represented by unions, calling for increases to become effective October 1, 1971, and April 1, 1972, were executed before November 8, 1971, and a pass through of the costs of those

increases is clearly permitted by Price Commission policies. (CCH Econ. Controls Rep. Par. 5345.20) The pattern of increases agreed upon by those contracts was established by a Federally constituted board—Emergency Board No. 178—and the first two steps in the staged increases which the board recommended were adopted by the Congress in legislation enacted December 10, 1970, to halt a work stoppage (P.L. 91-541). Under these circumstances, it is clear that the railroads had no real alternative to the execution of contracts, also following the pattern of Emergency Board No. 178's recommendations, with the Brotherhood of Rilroad Signalmen, on November 16, 1971, with the International Brotherhood of Firemen and Oilers, on February 11, 1972, and with the Sheet Metal Workers Int'l. Ass'n., on May 13, 1972. Thus, even though these contracts were executed after November 8, 1971, we conclude that to require the carriers to absorb the costs of the wage increases which they represent, to the extent that such increases exceed 5.5 percent per year, would be grossly inequitable, and that the full costs of such increases should be taken into account in considering the carriers' costs of operation.

9. That the increase in productivity required to close the gap between the maximum revenue obtainable by the railroads under the freight rate increases considered herein and the cost increases experienced by them will exceed by far the 6.3-percent guideline for the railroad industry suggested by the Price Commission in rules issued on May 3, 1972.

Future evidential requirements.—Looking beyond the exigencies of this proceeding, respondents are advised and forewarned that our acceptance of annualized costs and other data of a type submitted in this and in prior general revenue proceedings is not an irrevocable commitment; and that, in the future, we will require a much more variable data base to support an application for revenue relief. To this end, we intend promptly to institute a rulemaking proceeding looking toward prescription of minimum evidentiary requirements in railroad general increase cases to supplement the regulations in 49 CFR 1102. We realize, however, that the process leading to an ultimate determination of such requirements will consume considerable time, based on our experience in Ex Parte No. MC-82, *New Procedures in Motor Carrier Rev. Proc.*, 339 I.C.C. 324, and 340 I.C.C. 1.

Accordingly, as an interim measure, we have determined to indicate the evidentiary showing which should be made in any rail revenue proceeding which might be instuted prior to the

promulgation of specific procedures. Provisions relevant to such an evidentiary showing are set forth in appendix B and will be referred to as "interim procedures." They include the provisions regarding application, service, and verification previously promulgated in our procedural order of August 13, 1970, *supra*. We wish to make it clear, however, that respondents are not precluded from submitting additional evidence to support their proposals.

Summary.—We conclude that the Nation's railroads as a whole and by major districts have a serious and immediate need for additional revenue; and that their ability to meet current expenses and to provide the capital for improvements in equipment, facilities, and services requires prompt revenue relief; and that the public interest and that of the national defense in a sound, adequate, and efficient transportation system will be adversely affected unless such increased interstate freight rates and charges as are hereinafter authorized are permitted to become effective promptly. Conversely, we find that without that additional revenue, the earnings of respondents will be insufficient to enable them, under honest, economical, and efficient management, to provide adequate and efficient railway transportation service consistent with the public interest and the national transportation policy.

ENVIRONMENTAL CONSIDERATIONS

Before discussing in detail the specific tariff proposals by which respondents have sought to meet their revenue needs, we shall first consider the freight rate increase proposals before us in their overall aspect in light of the policy expressed in the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*

Background.—In our prior report in this proceeding, entered December 21, 1971, we noted that the carriers had failed to submit a statement with their petitions regarding the environmental impact of their proposal. The petitioners were instructed to file and serve an environmental impact statement within 10 days from the date of service of those orders, and the railroads filed their statement on January 3, 1972. The above-mentioned report and accompanying orders were served on all parties to the prior case,[10] and on all

[10]Service on the parties to these earlier freight rate increases included service on a group styling themselves as Students Challenging Regulatory Agency Procedures (S.C.R.A.P.). That group's principal argument, before this Commission as well as in the U.S. District Court for the District of Columbia (civil action No. 971-72, *Students Challenging Regulatory Agency Procedures (S.C.R.A.P.) and Council on Environmental Quality* v. *United States of America and the Interstate*

(footnote continued on next page)

known consumer and environmental interests. In addition, the orders were published in the Federal Register. As a consequence, all persons interested in the environmental issues received due notice of our intention to consider such issues and have been accorded an opportunity to participate in this proceeding. Inasmuch as we conclude that our actions herein will neither actually nor potentially significantly affect the quality of the human environment, we have not included in our report an extensive formal impact statement. Notwithstanding, our findings respecting commodities being transported for purposes of recycling permit interested parties to file comments before the increases become effective.

By our order dated February 1, 1972, we found that approval of the request by the Nation's railroads to impose a 2.5-percent emergency surcharge on all freight shipments beginning February 5, 1972,[11] would have no significant adverse effect on the movement of traffic by railway or on the quality of the human environment within the meaning of the NEPA. In approving this temporary increase (then conditioned to expire on June 5, 1972), we further noted, among other things, that the railroads have a critical need for additional revenue to offset, in part, recently incurred increases in their operating costs.

By order dated March 1, 1972, and served March 6, 1972, a draft environmental impact statement (a copy of which is attached to this report as appendix C), was served on all parties to this proceeding and on other governmental agencies (including the Council on Environmental Quality, Environmental Protection Agency, and the Office of Environmental and Urban Systems, Department of Transportation), which might have an interest in that matter. By its decision of July 10, 1972, in *S.C.R.A.P.* v. *United States*, civil action No. 971-72 (D.D.C.) the United States District Court for the District of Columbia enjoined the collection of the 2.5-percent interim surcharge on goods being transported for purposes of recycling after July 15, 1972, because it found that this Commission had failed to give adequate consideration to environmental amenities in

(footnote 10 continued)
Commerce Commission, referred to later in this report), was that those two rate increases had violated the terms of NEPA and were therefore invalid. S.C.R.A.P. also argues that this Commission should order a refund of moneys paid under these invalid rates, and "suspend consideration of any additional or further requests for freight rate increases by the nation's railroads, pending a hearing" on S.C.R.A.P.'s contention.

[11] We had earlier denied, by order entered January 7, 1972, a petition filed December 20, 1971, by S.C.R.A.P. seeking a 2-week extension of time beyond January 20, 1972, for filing protests against the proposed surcharge and an additional 2-week extension of the date (February 5, 1972) on which such surcharge was to become effective.

the draft impact statement.[12] That statement was issued to emphasize certain of the environmental matters at issue in this proceeding and in full recognition of the fact that the involved statement did not comply with all of the requisites of an environmental impact statement as defined by the NEPA. Not only was that statement issued prior to the completion of this Commission's study of our responsibilities pursuant to the NEPA and prior to our final adoption of regulations implementing the NEPA *(Implementation—Natl. Environmental Policy Act, 1969*, 340 I.C.C. 431 (1972)), but it expressly contained the caveat that the opinions and conclusions there set forth were tentative and based only on the evidence then available. It was explicitly recognized that more evidence would be needed before the environmental impact of this matter, including the selective increase proposal filed February 28, 1972, could be definitively measured. We trust that the statement and findings contained in this report fully comply with our environmental duties imposed by the Congress and with the regulations, which became effective March 28, 1972, adopted in the above-mentioned proceeding. While we agree with the view expressed by a number of courts, including that in the *S.C.R.A.P.* case, *supra*, that the Congress plainly did not intend NEPA to be a paper tiger, it must be realized that the Congress at the same time failed to appropriate any additional funds with which this Commission might meet these added duties at the highest level of compliance that might be theorized. What the court characterizes as a "wholesale abandonment" of the impact statement procedure represents an earnest attempt by this Commission to comply with the statutory requirements of NEPA "to the fullest extent possible" while bearing the burden of the obligation without appropriation.

Representations.—Environmental comments in the form of initial and reply verified statements have been filed by divergent interests, pursuant to the procedure prescribed in our orders of December 22, 1971, and March 6, 1972, concerning (1) the surcharge which became effective on February 5, 1972, and (2) the selective increases proposed by the railroads. Each of the parties submitting representations has expressed the opinion that its interest must be protected for the overall good. A summary of the environmental

[12] On July 19, 1972, in *Aberdeen R. Co.* v. *S.C.R.A.P.*, No. A-73 (Sup. Ct., Oct. Term) Chief Justice Burger, acting as Circuit Justice for the District of Columbia Circuit, denied this Commission's application for a stay of the district court's judgment pending appeal. He concluded that, on balance, the district court did not abuse its discretion in deciding "that there was danger to the environment outweighing the loss of income and consequent financial threat to the railroads."

issues raised and the facts of record in this proceeding as they bear upon those issues is contained in appendix D.

Environmental discussion and conclusions.—Each of the participants in this proceeding has had full advantage of an opportunity to express their views as to the impact that the temporary surcharge and the selective freight rate increases here under consideration may have upon the quality of our human environment. The presentations submitted by these parties have been helpful, and we believe that the vital public interest in a clean and healthful environment ultimately will be furthered by the arguments they have advanced. This is so even though many of the comments and representations are plainly advanced in furtherance of those parties' own particular or special interests. For example, the submitting railroads contend that they should not be required to finance industrial ecological programs through the maintenance of unduly low freight rates; the shipping interests request that their products not be subject to the proposed rate increases or that those products should be subject to certain holddowns; the environmentalists maintain that rates on secondary materials (which assertedly should move in greater volumes for recycling purposes) ought to be preserved and protected (if not lowered) at all costs; and the governmental interests together with the private environmental sector seek to demonstrate that this Commission should investigate environmental matters and effects more extensively with our own resources. Be that as it may, it is deserving of mention at this point in our deliberations that our own independent study, conducted with the limited resources and within the time available to us, has failed to uncover any possible environmental effects of our present action other than those to which the parties have fully addressed themselves. As a consequence, it is these arguable environmental effects that necessarily comprise a major part of our evaluation of environment factors in this proceeding.

We recognize, however, that there is no absolute or mathematically conclusive method of balancing the environmental, economic, and social values involved in a proceeding of this type. Accordingly, in our attempt to analyze the probable results of any action we take in this proceeding upon the quality of our human environment, we have carefully examined the evidence of record, applied our expertise in surface transportation, and utilized to the fullest extent possible, given the limitations of time and budget, all available expertise in ecological, economical, and social areas.

As Chief Justice Burger stated in *Aberdeen R. Co.* v. *S.C.R.A.P.*, *supra:*

Our society and its governmental instrumentalities having been less than alert to the needs of our environment for generations, have now taken protective steps. These developments, however praiseworthy, should not lead courts to exercise equitable powers loosely or casually whenever a claim of 'environmental damage' is asserted. The world must go on and new environmental legislation must be carefully meshed with more traditional patterns of federal regulation. The decisional process *** is one of balancing and it is often a most difficult task.

We trust that any court that may be called upon to review this environmental discussion will accord appropriate weight to economic and social considerations in addition to that which might be given environmental matters. Certainly one important area of human life should not be permitted to operate to the detriment of all others. It is our responsibility, as well as that of the courts, to balance fully the costs and benefits of our actions.

It is the purpose of the NEPA to have Federal agencies such as this Commission, in cooperation with State and local governments and other public and private organizations, use all practicable means and measures to create and maintain conditions under which man and nature can exist in productive harmony. To this end, section 102 of the NEPA specifically requires that, to the fullest extent possible, we shall—

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality ***, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should this proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes; ***.

The NEPA section 102 impact statement is intended as a device to assure that Federal agencies investigate and give weight to any significant environmental effects caused by action which they take, to require the development of less damaging alternatives, and to assure that those effects are made known to the public before the action is undertaken. The guidelines of the Council on Environmental Quality, reproduced in appendix A to our report in *Implementation—Natl. Environmental Policy Act, 1969, supra*, seek to coordinate the efforts of Government agencies and to allow Federal agencies to assess in detail the potential environmental impact of a considered course of action in order that adverse effects may be avoided, and environmental quality restored or enhanced, to the fullest extent practicable.

Preliminary to an evaluation of the present record in the light of environmental considerations, we must discuss the extent of our responsibilities in this proceeding to develop and present evidence as to the environmental consequences of the temporary surcharge and the supplanting selective freight rate increases requested by the railroads. Certain parties to this proceeding have taken the position that this Commission should itself supply *all* the data necessary for the fullest evaluation of the environmental effects of a considered action.[13] This Commission is a quasi-judicial agency which constantly seeks, within the bounds of our budgetary and personnel resources and our transportation expertise, to develop fully the record in each proceeding before us.[14] Cf. *Calvert Cliffs'*

[13]By letter of March 16, 1972, the Environmental Defense Fund requested permission to cross-examine certain railroad witnesses, as well as those Commission personnel preparing the draft environmental impact statement issued in the proceeding, at the hearings which were scheduled to commence on March 23, 1972. At the hearings, EDF withdrew its request to cross-examine the railroad witnesses, but again formally asked to cross-examine the individuals within the Commission that were responsible for the preparation of the Commission's draft impact statement. This request was denied by the hearing officer. We affirm that ruling. To the extent that draft environmental impact statements, such as the one issued in this proceeding, contain data and analyses, the actual sources of that information are either identified in the statement itself or are readily apparent from its subject matter. In the instant proceeding, the factors and discussion embraced in the draft statement were developed from the arguments and contentions of the parties that earlier were presented in Ex Parte Nos. 265 and 267. As a consequence, no useful purpose would be served through the requested cross-examination which is hereby denied.

[14]It should be mentioned that because of our concern with the reuse and depletion of our land and natural resources, we have recently promulgated regulations (49 CFR 1062.1), Ex Parte No. MC-85, *Transportation of "Waste" Products for Reuse*, 114 M.C.C. 92 (1971), which permit motor carriers to receive special authority from this Commission to operate in interstate commerce upon a showing that they will transport "waste" products for reuse or recycling in furtherance of a recognized pollution control program. It is our hope that the adoption of these regulations will encourage all motor carriers to join in the national effort to save and restore our American environment.

Coordinating Committee v. *U.S. Atomic Energy Comm.*, 449 F. 2d 1109 (1971). The severe limitations on both our funds and personnel, of which the Congress and the public are fully aware, as well as the nature of the subject matter preclude the conduct of our own empirical research and the direct gathering by us of environmental data to any significant degree. We have here attempted, however, to utilize all *practicable* means and measures to evaluate environmental considerations to the fullest extent possible. We do not believe that the Congress intended for us to go beyond the "practicable" when it enacted NEPA. (See 42 U.S.C. 4331.) We must, as a consequence, depend in substantial part on the parties to a proceeding, at our direction, to furnish all needed information, and shall continue to direct those parties to supply that information necessary to allow us properly to evaluate environmental issues coming within our jurisdiction.

We have, in this light, reviewed the record compiled in this proceeding and we do not find wanting—given the current, admittedly underdeveloped state of proficiency and expertise that might be brought to bear on this matter—the evidence that is or would reasonably be determinative of the environmental issues embraced in the present proceeding.

The basic questions to be explored in this proceeding[13] are (1) whether increased rail freight rates will divert traffic from the railroads to other modes of transportation in degradation of our human environment, and (2) whether the proposed increased rail rates will adversely affect the movements (and hence, it is argued the recycling) of secondary materials. These are the essential environmental questions presented by the parties, including the Council on Environmental Quality, and their full consideration here will, in our judgment, entirely satisfy our duty under the NEPA to develop the full range of impacts of the surcharge and proposed selective rate increases.

Neither of these fundamental questions can be answered, we believe, without some reasoned consideration of how the responsibility for protecting the environment should be apportioned

[13]The decision of the court in *S.C.R.A.P.* v. *United States*, *supra*, has, for all practical purposes, rendered consideration of the environmental impact of the 2.5-percent surcharge moot. As noted above, the court stayed the effectiveness of the surcharge and concluded that the damage done to the environment is likely to be irreparable and cannot be undone by subsequent rebates to shippers since once raw materials are extracted from the ground and used, they cannot be returned from whence they came. It should be noted, however, that our findings with respect to the selective increases apply with virtually equal force to the impact of the surcharge upon the environment.

among the larger segments of our society. The rail carriers contend in this connection that the industry creating the waste in the first instance should bear the complete responsibility for disposing of such waste. On the other hand, industrial concerns and other shippers aver that they are fulfilling their environmental responsibilities by conducting environmental research, and that the railroads should bear the burden of transportation costs so that funds are not diverted from industry environmental research. These interests both contend that they are deeply concerned with the environment, but each would prefer to leave any sacrifices for ecological protection to its counterpart. In fact, however, environmental improvement is a national goal and all segments of our Nation—including industry, the railroads, governmental organizations, and private citizens—must cooperate to achieve that end.

We are of the opinion that the creator of waste properly should be called upon to bear a major responsibility for disposing of that waste in an ecologically sound manner. Of course, other segments of our economy must not construct unnecessary or undesirable barriers to the economic disposal of such commodities. The railroads have transported waste and scrap products at just and reasonable rates for many years—indeed, before environmental aims became fashionable—and the increases approved in this proceeding will not, in our judgment, alter that pattern.[16] The evidence here of record, as well as our analysis of such evidence in the light of all available source material, convincingly establishes that, despite the increases on secondary materials authorized in this report, they will continue to move by rail with the same or greater frequency as before. It is further established that, without those increases, the railroads would not be able economically and efficiently to provide the shipping public with the service it requires. If this were allowed, the Nation would be faced with an economic as well as an environmental crisis. For, if the railroads cannot properly finance their operations, their services and operations will deteriorate and either the traffic will then be diverted to other modes of transportation or it will not be transported at all.

The rails must move commodities at just and reasonable rates and should attempt, wherever practicable, to promote the transportation of secondary materials. To direct them to do more is to require the

[16] It should be noted at this point that this view is the result of our consideration of the present and future economic and environmental effects of the proposed action and not merely the incremental change in the situation since the last rail freight rate increases were permitted.

rail carriers to bear the environmental burdens of their customers. Most, if not all, of these carriers are not financially capable of assuming those burdens; and an effort to shift the economic cost to shippers of other commodities in the form of increased rates or charges might well result in discrimination or prejudice proscribed by section 2 or 3(1) of the act. In any event, it is this Commission's statutory responsibility to prevent the railroads from pursuing any course of action which might jeopardize their total ability and duty to serve.

It is said that our approval of all or part of the railroad's proposals selectively will tend to divert traffic to truck transportation and thereby further to despoil the environment. We deem the syllogism to be simplistic and speculative, and we decline to accept its mere assertion as a basis for our decision.

It is true that the trend of traffic has been away from the railroads. During 1971, the class I line-haul railroads (railroads with annual operating revenues of $5 million or more) carried 5.9 percent fewer tons of revenue freight than during 1970, a decline from 2,613.6 million tons to 2,458.6 million tons, and revenue ton-miles decreased 3.6 percent, from 762,544 million ton-miles to 739,391 ton-miles. Transport Economics, March-April 1972, page 7. The trend is more pronounced and of longer duration in terms of the railroads' share of the transportation market. In 1970, the railroads handled less than 40 percent of the total intercity ton-miles of freight transported by all modes of carriage, public and private, a decline of 7 percent from the 43-percent share of the market that the railroads enjoyed 10 years earlier, in 1960 (85th Annual Report, 1971, page 119; 79th Annual Report, 1965, page 141). In contrast, during that same period the truckers retained their share or about 22 percent of the transportation market, with an actual increase in the ton-miles transported by them from 285 billion to 412 billion, an increase of 45 percent. *Id.* We do not think these marked shifts in traffic patterns fairly can be attributed to only the railroads' pricing policies.

Truck transportation long has been recognized as offering certain inherent advantages over rail transportation. *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83 (1957). These have included the speed, flexibility, and smaller cargo units peculiar to that mode, and the developments of the past decades in these areas have further favored truck transportation over rail transportation as a mode of intercity carriage. Foremost as a factor improving the truckers' ability to effect rapid deliveries has been the completion of much of the Interstate Highway System and the greater speed that the

vehicles operating over it are able safely to maintain. Related has been the accelerated dispersal of industrial plants and commercial establishments into suburban and even rural areas, often removed from rail lines, further emphasizing the unique ability of trucks promptly to perform door-to-door service. Finally, the improvements in small containers and demountable truck bodies have emphasized the relative greater ease with which these can be dropped off to be loaded by shippers who do not ship in quantities sufficient to enable them to tender carloads of freight to the railroads.

At the same time railroad service to some extent has been deficient. In our report in *Increased Freight Rates, 1970 and 1971*, 339 I.C.C. 125, 156 (1971), we noted several areas in which shipper complaints had been numerous and appreciable improvements were required, particularly, terminal delays, interchange delays, erratic delivery and deliveries not reasonably timed or spaced. Similarly, in our report in *Investigation of Adequacy of Freight Car Ownership*, 335 I.C.C. 264 (1969), sustained, *Allegheny-Ludlum Steel Corp.* v. *United States, et al.*, 325 F. Supp. 352 and *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972), we called attention to the increasingly unsatisfactory performance of the railroads both in terms of car supply and their utilization. Certainly shippers encountering poor service on the rails would be inclined to explore the alternatives offered by truck transportation.

In sum, the shippers' reliance upon rail service is a product of many factors, all of which combine to make up what the economists term the demand for rail service, and the shippers' ability or willingness to divert traffic to truck transportation is expressed in the elasticity of demand for such service. The elasticity of demand for rail service varies being considerably greater for some commodities than for others and being more pronounced for shorter distances than for longer. Thus, we note that long-haul rail transportation of livestock has all but disappeared and is now handled by truck. On the other hand, long-haul truck transportation of new automobiles has largely ended, having been recaptured by the rails. No all inclusive generalization is possible. See *Transportation of "Waste" Products for Reuse, supra.*

Grain and other agricultural commodities perhaps more than any other category of freight demonstrate the elasticity of damand for railroad service. In our Big John case of a few years ago, *Grain in Multiple-Car Shipments—River Crossings to So.*, 321 I.C.C. 582 (1963), we noted the increasing participation of trucks and barges in

grain movements to the South, a trend which has been no less pronounced in other parts of the country. Grain Transportation in the North Central Region, U.S. Department of Agriculture (1961). What makes such products particularly susceptible of diversion from the railroads is that their transportation by motor carriers or, when transported in bulk by water carriers, is exempt from regulation by us. There is freedom of entry into the business, and the setting of rates and charges is wholly within the discretion of the carriers soliciting the traffic. Aided by technological advances in the vehicles and vessels they utilize and continuing improvements of the highways and waterways upon which they operate, the truckers and bargelines transporting grain and other agricultural commodities have proved themselves to be forceful and effective competitors to the railroads, often offering better and cheaper service.

The response of the railroads, perhaps slow in coming, has been to cut their rates to meet the competition of the truckers and bargelines wherever and to whatever extent they can. Thus, as a practical matter, the exempt carriers for the past several years have set the rates for the movement of grain and other agricultural commodities. A study of the U.S. Department of Agriculture, The Economics of Farm Products Transportation, Marketing Research Report No. 843 (1969), confirms that, "[f]reight charges for traffic that is subject to active intermodal competition generally reflect the lowest rates at which truck or barge operations (singly or in combination) would be prepared to offer service." As that study explains:

> For-hire motor and barge operators, therefore, have generally taken the initiative in extending intermodal competition for farm products to more and more shippers in a widening range of locations. At any time, the outer geographic limit of service is set by truck or barge costs in relation to existing rail rates, and the extension of transportation alternatives to these limits brings pressure in turn on rail carriers who respond to the actual or proposed diversion of traffic by seeking—through regulatory channels—to reduce rates or improve service or both. The reduction typically brings rail rates about into line—on a service-equivalent basis—with the lowest rates at which competing carriers can offer service over the same or alternative routes. Once such an adjustment has taken place, the specific sequence of challenge and response initiated by intensified truck or truck-barge competition is concluded. [Footnote omitted.]

In such competitive context the threat of diversion as a result of our actions herein fails to comport to reality, for, bearing in mind that our order is permissive and not mandatory, it is unlikely that the railroads will avail themselves of the authority to increase the rates and charges except to the extent that the level of truck and barge-line rates would enable them to do so without losing the traffic.

No commodity of great importance to the railroads better reflects the interplay of the many and varied factors influencing its movement, only one being the level of railroad rates and charges, than does coal. We frequently have noted the intense competition that utility coal encounters from other energy sources and have allowed the railroads to innovate reduced rate proposals to stem the threat of diversion. See *Coal to New York Harbor Area,* 311 I.C.C. 355 (1960); *Coal from Ky., Va., & W. Va. to Virginia,* 308 I.C.C. 99 (1959). The demand for low sulfur content fuels within recent years has introduced a further factor disrupting traditional patterns of coal movements by the railroads.

The movements of utility coal by the railroads are influenced very slightly if at all by our authorization of general rate increases. The commitments to use rail-transported coal are long range and virtually fixed and reflect a supplier's contract to deliver a certain quantity of coal of a specified quality over the life of the agreement, on the one hand, and, on the other, the utility's investment in a plant with burners and other facilities dedicated to the use of such coal. As to this and similar traffic, then, we believe the fears of diversion of tonnages from the railroads as a result of the actions we approve herein are without foundation, and we refuse to speculate that such will be their result.

The level of the rail rates in relation to the level of the charges by truck, of course, is a factor entering into the determination of the demand for rail service. But to suggest that we should not authorize increases in the rates and charges of the railroads, compelled by rising labor and other costs, because of the diversionary effect of such action, assumes that the pressures of escalating costs have not fallen as heavily upon the truckers and that the truckers have been able to avoid increasing thier rates and charges to the extent that the railroads have been forced to do. The facts as we know them support neither assumption.

An indicium of the rate increases that the truckers and the railroads have taken from 1960 to 1970 is the revenue per ton-mile that they have earned on their traffic. For the railroads the revenue per ton-mile rose from 1.403 cents in 1960 to 1.428 cents in 1970, an increase of about 2 percent. The revenue per ton-mile for class I motor common carriers rose from 6.310 cents to 7.458 cents, or about 12 percent. Transport Economics, January-February 1972. The truckers have sought virtually semiannual increases in their rates and charges, and even as this investigation was in progress we permitted the rate bureaus representing about 85 percent of the

regulated motor carriers of the Nation to publish increases ranging from 2 to 5 percent. These patterns scarcely suggest that the increases in railroad rates and charges have been the predominant cause of the diversion of traffic from the railroads to the trucks.

However, even if we were to assume, *arguendo*, that the increases in the railroads' rates and charges will tend to divert traffic to truck transportation, it does not thereby follow that the environment will be further despoiled. The data on the relative polluting effect of train and truck operations is fragmentary and inconclusive, at best.

We were obliged to consider the relative polluting effect of train and truck operations in Bush Terminal R. Co. Abandonment, review pending, civil action No. 71-C-1639, *City of New York* v. *United States* (E.D. N.Y.). In our report on further consideration in that proceeding, we concluded that the substitution of truck service for the railroad operations sought to be abandoned would not significantly increase the level of air pollution in the affected area. We relied, in part, upon data derived from Nationwide Inventory of Air Pollutant Emissions, 1968, Publication No. AP-73 of the National Air Pollution Control Administration, U.S. Department of Health, Education and Welfare (1970), which we found "shows that diesel trucks emit *less* carbon monoxide and nitrogen oxide per 1,000 gallons of fuel than diesel trains, with the amounts being similar in the other pollutant categories." We also heard testimony based upon a preliminary draft of Compilation of Air Pollutant Emission Factors, Office of Air Programs Publication No. AP-42, U.S. Environmental Protection Agency (1972), which study confirms that in some respects heavy-duty diesel trucks are not as offensive as locomotives, although it concludes, on the basis of unpublished data, that diesel trucks emit *more* carbon monoxide and nitrogen oxide per 1,000 gallons of fuel than diesel trains.

The lack of publicly available data on air polluting locomotive exhaust emissions was noted in A Study of the Environmental Impact of Projected Increases in Intercity Freight Traffic to Association of American Railroads, Battelle Columbus Laboratories (1971). That study proceeded on the assumption that locomotive diesel engine emission characteristics are not substantially different from those of truck diesels. However, based on an estimate that trucks require the expenditure of four times as much energy, on the average, as railroads in moving a gross vehicle ton-mile, the study concludes that on a per-ton-mile basis, railroad exhaust emissions are substantially lower than motor truck exhaust emissions. In other respects, particularly peak sound levels, the study states trains and

trucks are not dissimilar in the environmental impact of their operations.

An even more exaggerated claim of the relative greater efficiency of trains is contained in Commoner, The Closing Circle, 171 (1971). That study, without supportive data, asserts "[t]he energy required to move one ton of freight one mile by rail now averages about 624 btu (British thermal units), while trucks require about 3,460 btu per ton mile. This means that, *for the same freight haulage*, trucks burn nearly six times as much fuel as railroads—and emit about six times as much environmental pollution" [emphasis in the original].

Our conclusions as to the relative efficiencies of diesel-powered locomotive and diesel-powered trucks, the preponderant vehicles handling intercity freight, are more conservative than those of either of the foregoing studies. Relying upon the fuel consumption figures cited in the H.E.W. publication and our reported ton-mile data, we note that in 1968 the railroads transported 756,800 million ton-miles of intercity freight and consumed 3,810 million gallons of diesel fuel. That same year trucks handled 396,300 million ton-miles of intercity freight and consumed 5,350 million gallons of diesel fuel. Thus, we would calculate the relative greater ability of locomotives than trucks to transport ton-miles of freight per gallon of fuel consumed as being less than three to one.

The pitfalls of quanitification are avoided in yet another study, Railroad and Railroad Freight Operations and the Environment, National Industrial Pollution Control Council (1972), which merely concludes that "[t]he rail mode—a highly efficient means of transporting goods and people—has the advantage of producing relatively low pollution per ton mile." Yet that report acknowledges that railroad diesel engines currently in use, no more than truck diesel engines, would be able to meet the gaseous emission standards proposed for adoption by the Environmental Protection Agency. It also observes that the sound levels for freight trains and trucks are similar.

In our attempt to assess whether rail or truck transportation is the greater polluter of the environment we have been handicapped by the insufficiency of available data. Measured in terms of ton-miles of freight handled per gallon of fuel consumed, locomotives seem to be the more efficient vehicles and hence lesser pollutants than trucks. However, supportive data are unavailable or, if available, unpublished, and accordingly the definitive testing of the conclusions and the effective calculation of the relative efficiencies of trains and trucks are not possible. Similarly, probative data are unavailable or

unpublished to permit a reliable comparison of the emission characteristics of locomotives and trucks, although it would appear that they are not markedly dissimilar. The absence of data may be corrected by studies undertaken by the Environmental Protection Agency or others, and we earnestly recommend that they be undertaken.

Several of the parties also contend that the sought rate increases, if approved, would merely aggravate basic longstanding discriminations against secondary materials which, assertedly, are embedded in the present rate structure; and they urge that we use this proceeding as a vehicle for resolving that issue. An in-depth investigation of the type suggested, however, is clearly impractical, indeed impossible, in the context of this proceeding where the principal issue is whether the Nation's railroads have an *immediate* need for overall revenue relief. The long delay in decision-making which necessarily would result from expanding the scope of our investigation in the manner requested would be tantamount to a denial of effective relief. In any event, we currently have under way a comprehensive investigation in Ex Parte No. 270, *Investigation of Railroad Freight Rate Structure*, 340 I.C.C. 868, a proceeding which was instituted by us in recognition of the growing concern regarding the pricing of railroad services. More particularly, we felt the need for exploring whether, as has been contended, the application by the railroads of the increases in rates and charges as approved by us, especially when measured as percentages of existing rates, have over the years caused a misalignment of rate relationships and a distortion of proper rate levels. A specific area we have assigned for development in that case is the way in which our prior rate decisions may have had an effect on the Government's program of protecting the environment. The Institute of Scrap Iron & Steel, Inc., the National Association of Secondary Material Industries, Inc., and other parties to this proceeding are parties as well to Ex Parte No. 270.

In our subsequent analysis of economic and regulatory aspects of increases proposed within particular commodity groups, we have given careful consideration to environmental factors. Based on that analysis, we are persuaded that prior recent general increases in railroad freight rates and charges have not substantially affected the use, consumption, or shipping of secondary materials, and that increases at the levels authorized herein will have no significant adverse impact on the quality of our human environment. Rather, we believe that a likely result of the overall limitation and the specific

holddowns we shall impose will be to encourage the movement of various affected recyclable commodities.

But if we are wrong in our judgment and in some now unforeseen manner movement of a particular commodity involved in the recycling process should be adversely affected, we believe that any resulting harm to the environment would not be so significant as to warrant relief. In this respect, we find that the cost to the Nation's railroads in terms of the loss of badly needed additional revenue, outweighs, on balance, that harm.

Our order in this proceeding provides that the increases authorized herein may be implemented upon 15 days' notice to the Commission and the general public. Having in mind the carriers' urgent need for prompt revenue relief, we believe that period, albeit brief, is necessary and will provide adequate time for shippers and other affected interests to make required commercial adjustments. However, in view of the court's injunction and its interpretation of the notice requirements of NEPA, we are constrained to make an exception in the case of commodities moving in the recycling process. As to those commodities, interested persons may submit, through the filing of appropriate petitions, their views concerning environmental aspects of this case within 25 days of the date of service of this report; and our order prohibits the carriers from making effective authorized increases relating thereto except upon 35 days' notice.

INCREASES PROPOSED

We now turn our attention to the specific tariff proposals whereby respondents seek to obtain the additional revenue found to be required.

Surcharge.—At the outset, we find the temporary 2.5-percent surcharge tariff X-281, to the extent permitted to become effective by our order of February 1, 1972, as amended, and as modified with respect to recyclable materials pursuant to the injunction entered on July 15, 1972, by the United States District Court for the District of Columbia, was responsive to an immediate and critical revenue need of the Nation's railroads and was just and reasonable and otherwise consistent with the act during the limited period of its applicability.

In this connection, we observe that the surcharge (1) was applied to recyclable materials for a period of less than 6 months and will terminate in its entirety upon implementation of the supplanting in-

creases authorized in this report; (2) involves a single-level increase applicable nationwide with relatively few exceptions (principally in the southern district), and thereby maintained the *status quo* at least with respect to relative rate relationships; and (3) was established at a relatively low level compared to cost escalation actually experienced by respondents subsequent to the close of the evidentiary record in the prior case.

In these circumstances, and upon consideration of the whole record before us, we are persuaded that any adverse effects on shippers and upon the quality of the human environment resulting from the surcharge are outweighed, on balance, by the deterioration of essential railroad services which would have occurred had respondents not obtained the benefit of the additional revenues derived therefrom.

Selective increases.—The increases proposed in tariff X-281-A, however, present a different and far more complex situation. As noted, they are permanent increases intended to supplant the surcharge and are sought to be applied on a selective basis with numerous commodities and services taking different levels of rates and charges ranging up to 10 percent both within major districts and interterritorially.

As a consequence, the burden of meeting respondents' overall revenue needs falls disproportionately on certain commodities and services and on others not at all; and this circumstance has given rise to the greatest volume of protests in this proceeding.

Selectivity, however, is not a newborn phenomenon. Historically, so-called "across-the-board" single-level general increase proposals have had a selective aspect since, invariably, they contained provisions excepting certain commodities or services from application of the increase either in whole or in part.

The principal reason for this was, and continues to be, a practical one: an awareness that certain traffic will not move at all or will be diverted to other modes if made subject to higher rate levels. As to such traffic, therefore, blanket or uniform application of a general increase would be counterproductive. Instead of producing additional needed income, an actual loss of revenue would result.

In recognition of this loss-susceptibility factor inherent in across-the-board single percentage increases, we have not required that the burden of meeting established rail general revenue needs be distributed evenly over all traffic. Out of necessity, that burden has been placed principally on that segment of the total railroad traffic

base considered capable of bearing (without likelihood of significant revenue loss) increased rates and charges, subject to holddowns and other limitations imposed by us to prevent unjust discrimination and undue preference and prejudice or where otherwise warranted in the public interest.

Accordingly, the fact that the increases here involved are *selective* serves simply to emphasize, rather than newly to create, a circumstance present particularly in general increase tariffs considered in recent years. In the latter tariffs, the number of exceptions and individual line flag-outs progressively reached a point where we indicated that a selective approach in form would be more informative to shippers and the public as to the increases actually proposed to be applied on each commodity or commodity group. Compare, prior case (at pages 135-136) and *Increased Freight Rates, 1968*, 332 I.C.C. 714, 715.

This expectation has been realized only partially in the instant selective increase proposal because as filed and supplemented, it too contains a plethora of exceptions and has been followed by a veritable myriad of partial or complete flag-outs by individual lines, each apparently prompted by fear of loss or diversion in the event particular selective increases were fully applied to their traffic. Despite these circumstances, the tariff, in our judgment, remains sufficiently broad in scope to retain the nature of a general revenue measure since, viewed in its totality, it affects the entire rate structure and is intended as a response to an immediate overall revenue need of the railroad industry.

Nevertheless, we are acutely aware, as respondents must be, that the continued and increasing erosion of the traffic base available for meeting those needs constitutes a clear warning that the time fast approaches (and, indeed, may have arrived) when they can no longer expect any significant revenue relief via the avenue of a general increase. Greater reliance must be placed on other means, including self-help by attracting additional revenue through redoubled efforts to improve service, by reducing expenses through prudent cost-cutting and further increases in productivity, by seeking specific rate adjustments addressed to circumstances surrounding particular movements of traffic, and, where adequately justified, by obtaining outside assistance to preserve services which, though required in the public interest, fail to yield an adequate return.

Another contention made by numerous opposing parties is that proposed increases are unjust because present rates on commodities

shipped by them return revenues in excess of variable or, in some instances, fully allocated cost. A related contention is that increases sought to be applied on certain types of movements are disproportionate to cost escalations attributable to such movements. However, neither circumstances is sufficient in itself to warrant disapproval.

The present rate structure is a highly pragmatic creation developed over many years and contains hundreds of thousands of rates and charges, which, while within a "zone of reasonableness," make widely varying contrbutions to net revenue. *Sugarcane From South Florida to Clewiston, Fla.*, 281 I.C.C. 47, 63. In an ordinary case, determination of whether a particular rate exceeds a reasonable level is based on a host of variable circumstances and conditions surrounding the movement of particular commodities, including competitive factors and detailed cost and traffic studies; and even when rates are found to yield revenues substantially above fully allocated costs they are not necessarily in excess of a maximum reasonable level. *General Motors Corp.* v. *New York Central R. Co.*, 311 I.C.C. 622, 625.[17]

In these circumstances, to give individual consideration to the massive volume of rates involved in a proceeding of this type would make impossible the effective and timely prosecution of our regulatory function. *United States* v. *Louisiana*, 290 U.S. 70, 76.

Rather, primary consideration in general revenue cases must be given to the general bases of rates and charges being proposed in light of broad policy considerations expressed in the national transportation policy, section 15a(2) of the act, the Hoch-Smith Resolution and, more recently, the Economic Stabilization Program, and the National Environmental Policy Act, 1969.

In this connection, we emphasize the permissive nature of this proceeding. Our conclusions do not require that any respondent increase its rates by any particular amount nor, except as specifically provided herein, do they preclude variability of application, provided increases do not exceed those allowed. Thus we do not purport to determine whether the particular rates which result from the increases are maximum reasonable rates, nor does our order constitute a prescription of rates within the meaning of the decision in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370.

[17] Whether and to what extent this situation can and should be changed is the subject of a major investigation proceeding we have instituted in Ex Parte No. 270. See *Investigation of Railroad Freight Rate Structure, supra.*

Accordingly, we are prepared to receive and promptly investigate complaints from any persons concerning individual rates; and where maladjustments are found to exist an adequate remedy by way of refund or reparations will be provided. *Atlantic City Electric Company* v. *United States*, 306 F. Supp. 338 (1969), and *Alabama Power Co.* v. *United States*, 316 F. Supp. 337 (1969), both affirmed *per curiam, sub nom. Atlantic City Electric Co.* v. *United States*, 400 U.S. 73 (1970). That avenue of relief is particularly appropriate to the various protestants herein whose evidence and arguments are based on claimed inequities which are not created by the instant proposal but rather arise from preexisting rate relationships, many of long standing.

Where, as here, respondents have shown a substantial and compelling need for immediate revenue relief, their judgment in apportioning the burden of meeting that need among varying segments of traffic should be accorded due weight since, presumptively, it reflects an intimate awareness of the degree to which certain traffic is capable of bearing increased rates, and every imposed adjustment will result in a loss of needed revenue.

But this does not mean that respondents are free of substantial evidentiary burdens. As a bare minimum they must show that their judgment is soundly based and does not create situations involving discrimination and preference and prejudice proscribed by the act or which otherwise contravene established policy. The public interest in the maintenance of a lawful rate structure must prevail over respondents' revenue need, however pressing.

As will be seen from our subsequent consideration of specific movements, whenever respondents have failed to meet this burden we have granted relief to aggrieved shippers and localities, including holddowns and exceptions to maintain established market relationships and to remove unduly harsh effects on long-haul traffic resulting from application of uniform percentage increases.

In addition, our review of the entire record, particularly testimony adduced at the oral hearings, persuades us that lack of adequate evidentiary support is most pronounced, indeed general, with respect to the higher levels of increases here proposed. As to those levels, we have found that respondents' justification consists almost entirely of general assertions to the effect that competition

and other factors[18] were considered. No attempt was made to specify the relative weight accorded any of these matters in their decision to single out certain movements for higher increases; and when, on cross-examination, it appeared that one factor was more prominent than others, underlying supporting data either was unavailable or not supplied when requested by opposing counsel at the oral hearing.

This evidentiary deficiency is illustrated by the following examples:

(a) The proposed $7.50 per car increase in minimum charges on pulpwood (in contrast to a $5.00 increase in similar charges sought to be applied on other traffic generally) results in an average rate increase of 8 to 8.5 percent on certain short-haul movements. On cross examination, a respondent witness explained this disparate treatment by referring to a "study" which purportedly showed that pulpwood was being carried at a loss. That study, however, was not made available upon request of opposing counsel. See transcript pages 87-91 (witness Lawrence), 246-249 (witness Emerson), and 423-436 (witness Souby).

The relevant issue here is not whether the proposed increased charge exceeds a maximum reasonable level (a proper consideration in a *rate* as opposed to a general *revenue* case) but, rather, whether the respondents were correct in their judgment that pulpwood traffic moves at depressed rates. If the study in fact is unreliable then they may have been unduly influenced by that circumstance in singling out pulpwood for a higher increase.

(b) A second example concerns a sought 10-percent increase:

[Protestant counsel Bercovici to witness Souby, cf. transcript pages 440-441]

Q. Do you recall the discussion of the increases on manufactured plastic products?
A. I don't recall the particular commodity, the discussions on it, no. At this particular meeting, I do recall something was mentioned but I really couldn't give you any answer.
Q. Would you be able to tell us if any studies were made on the amount of traffic, the direction of traffic, the productivity produced by the manufactured plastic product?
A. I don't know whether any were made at all.

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[18] As stated by witness Souby, Chairman of the Executive Committee of the Western Railroad Traffic Association and participant in the negotiations of chief railroad traffic officers which resulted in the selective increase proposal, these other factors "included such items as types of equipment required, contribution received from present rate levels, competition from other modes, market competitive factors, inter-commodity competition, as well as situations involving specific movements of traffic."

[and continuing on page 628, another witness]

Q. Mr. Feldman, before coming here to this hearing, or before preparing your statement which is designated as VS 64, did you review any of the documentation which underlied the work of the railroad committees in deriving these increases?
A. No, sir. As I indicated to you previously these were increases determined by our chief traffic officers which I had no participation in.

(c) Another example:

[Protestant counsel (Costello) to witness Miner transcript page 703]

Q. Well, do you know of any evidence that the railroads have put in at all [in their initial statements] in justification of the proposed ten percent increase in sugar beet rates?
A. No, I just indicated I did not know whether they entered any evidence specifically in connection with sugar beets.

[continuing on page 704, same witness]

Q. * * * would you consider that [your reply verified statements are] to be considered * * * [as] justifying the ten percent increase?
A. No, I would say that [my statement] is not the only justification.
Q. Do you know of any other justification?
A. Not specifically on sugar beets.

[continuing on page 729]

Q. Mr. Miner, have you made any specific investigation of the operating conditions in the rail sugar beet movement?
A. No.

[and on page 730]

Q. Have you made a study of the question of diversion?
A. No, sir.

(d) Another:

[Protestant counsel Simonds to witness Smith, cf. transcript pages 492-495]

Q. Mr. Smith, I assume you participated in the decision or determination in this proceeding to increase petroleum [coke] rates 8 percent and 10 percent, depending upon where the movement is, but to only increase bituminous coal rates 4 to 5 percent depending upon where the movement is. What I want you to state for the record—I want you to describe your role in that determination, what your recommendation was if you made a recommendation to the traffic committee, et cetera?

A. My activity in proceedings of this nature or meetings that lead up to the development of a revenue case is one of presiding at the meetings and determining the wishes of the railroads. The railroads decide what these increases will be, the chairmen do not decide that.
Q. But you are the railroads' spokesman in this proceeding?
A. That is correct.
Q. In making this decision, Mr. Smith, to increase petroleum coke rates at a higher level, percentage level than bituminous coal rates, what studies did the carriers make in reaching that determination?
A. Those individual studies were not available to me. The way those meetings come about, the railroads make their individual and separate studies involving their own properties and their own rates, they come to a meeting and jointly agree upon a common increase that all can proceed on. There are no specific or general studies for a territory as a whole, in other words, there was not one single study on petroleum coke throughout eastern territory.
Q. I take it, Mr. Smith, that something must have gone into the determination to recommend or to propose a ten percent, an 8 percent increase on petroleum coke and yet only a four to five percent increase on bituminous coal and what I am trying to find out for the benefit of the Commission is what kind of studies were made to justify that. This in effect was a selective increase, was it not?
A. Yes.
Q. Can you help us at all?
A. I can't help you as to how the individual railroads made their individual studies and arrived at 8 percent on petroleum coke in the east and 10 percent interritorial from the west to the east.
Q. Do you know whether any studies were made?
A. I presume there have been.
Q. But you are not aware of them?
A. I am not aware of the specific studies.
Q. And you are not aware of the cost studies?
A. No sir.
Q. And you are not aware of any marketing studies that were made?
A. I am not aware of any specifically, no.

(e) And another:

[Protestant counsel (Harrington) to witness Miner concerning a sought 6-percent increase on citrus fruit, subject to an additional 6 percent when moving in protective service, at transcript pages 355-356]

Q. Did you make any study to see whether you were right or wrong in your judgment [that a prior general increase would not result in substantial diversion]?
A. * * * I have not made a study * * * There has been a diversion. I will grant that. I mean a loss. Now I will take back the word "diversion". There has been a loss but I am not prepared to say that the freight rate increases had any effect one way or the other or what effect it might have had, if any.
Q. You did not make any study whether or not it had any effect?
A. No.

In view of this general evidentiary deficiency, we believe that overall relief in the form of uniform maximum increase limitations within and between the major districts is warranted. Accordingly, having considered the relative revenue needs of carriers operating within those districts, no increase will be authorized herein in excess of 4 percent within the South, 5 percent within the West, 6 percent within the East, and 6 percent interterritorially; and we find proposed increases above those limits not shown to be just and reasonable.

Discrimination.—By virtue of its very magnitude and differing rate levels, the selective increase tariff carries with it an enhanced likelihood that undue disruption of existing market patterns or relationships will result from its application in specific instances, particularly in situations involving border points and need for concurrences by individual carriers in rates appurtenant to through routes. In our subsequent analysis of the proposal as it applies to particular movements, we have attempted to preclude such discriminations whenever they have appeared. We recognize, however, that situations of this type, now unforeseen, may occur in the implementation of increases authorized in this proceeding. Accordingly, we emphasize that our order herein is not to be construed as approving increases which result in prohibited discrimination, preference, or prejudice; and should situations of that type be brought to our attention we shall provide prompt and effective relief to any injured parties.

Ports.—Nor is our order intended to authorize any disruption of established port relationships.[19] To warrant that result in a general revenue proceeding, evidence of changed circumstances far more detailed than that provided by respondents is required. Respondents, therefore, are required to maintain and preserve all existing port relationships (including those involving Great Lakes and Pacific coast ports) duly established by order of the Commission or recognized customs of the trade. Any disruption in such relationships arising out of the publication of tariffs pursuant to authority herein granted shall be promptly corrected.

In particular, we find that such disruption will occur as a result of provisions in tariff X-281-A whereby: (1) increases are proposed by western and southern carriers on export-import movements in trailer bodies, semitrailers, vehicles or containers on flatcars, both

[19]Under tariff X-281-A traffic moving in the export-import trade (including carload and TOFC/COFC) are assigned the same levels of increase applicable on domestic movements of the same commodities.

loaded and empty, while no increase is proposed by eastern carriers, and (2) Mississippi River crossings from Memphis to New Orleans are excluded from the description of southern territory in note 17, thereby unduly preferring shippers at other points in that territory.

Private equipment.—Certain protestants contend that no increase be permitted on commodities which move in cars furnished by shippers and that any charges assessed for services in connection with the movement of such equipment, whether empty or loaded, be exempted from any increase. In support of this position they argue that present milage allowances fail adequately to reflect actual ownership costs.

In our opinion, the appropriate method of compensation for use of privately owned cars is through allowances rather than adjustments in line-haul rates. Protestants' proper recourse should be by complaint alleging unlawfulness in existing allowance levels. In this connection, we note that proposals to subject empty covered hopper cars to a new 10-cent-per-mile charge and to current diversion and reconsignment charges presently are the subject of two separate investigations (in Docket No. 35363, Handling of Empty Tank and Freight Cars, U.S.A., and Docket No. 35419, Handling of Empty Rail Cars of Private Ownership, U.S.A.). Accordingly, the sought relief is denied as beyond the scope of this proceeding.

Stopoff charges.—Respondents propose to increase the charges for stopping cars or for stopping to complete loading or to partially unload by 6 percent, except in southern and western territory where the charge for this eervice would be increased to $50 per car if the present per-car charge is less than $50. .

The level of the increase, particularly in the South, is opposed as excessive, unreasonable, and unjustified by numerous protestants including the Secretary of Agriculture, the Southern Hardwood Traffic Association, the Associated Cooperage Industries of America, and 13 freight forwarders. Protestants characterize the privilege of stopping in transit as an incentive to encourage heavier loading and a means of preventing diversion to motor carriers. The proposed increase will raise the charge from $35.73 (at the Ex Parte No. 267-B level) to $50 or 39.9 percent in southern territory and from $44.05 to $50, or 13.5 percent, in western territory. In the East, the charge will be increased to $47.53. Protestants argue that these charges have been raised eight times since 1967; they do not comport with increases of 0-10 percent proposed on other commodities and services; that the increase in southern territory substantially exceeds the charge found just and reasonable in a 1970

proceeding; and that the percentage increase in the South is of such import as to warrant handling in a separate proceeding rather than as part of a general increase proposal.

Citing data developed by the Commission's Bureau of Accounts and published in statement No. 5-69, the Secretary of Agriculture asserts that the 1969 cost of stopping a car in transit in southern territory was $31.42. Adjusted to reflect current cost levels, he computes the fully allocated per-car cost as $36.41. Since the present charge in southern territory is $36.62, including the 2.5-percent emergency surcharge, the Secretary contends that it is adequately compensatory and that the proposed increase has not been justified.

Protestants also urge that continued increases in these charges will defeat the purposes for which the charges were established, and that the proposed increase violates section 3 in that it results in a greater increase to be absorbed by the small pool car buyer as compared with single carload shippers, thus allegedly, unduly preferring the latter. In reply to these contentions, the respondents state it is their duty to assess compensatory charges for this service. See *Stopping-In-Transit Charges & Restrictions*, 337 I.C.C. 605. In view of 1969 costs submitted by western and eastern lines of $47.64 and $49.73, respectively, and accepted by the Commission in the *Stopping-In-Transit* case, *supra*, the respondents claim there can be no serious argument with regard to the reasonableness of the considered charges. The proposals approximate nationwide uniformity and, according to the carriers, should be viewed as reasonable and nondiscriminatory.

As buyers of volume rail service, the protesting freight forwarders explain that their cars move daily between terminals in batteries of two or more and that utilization of the usual stopoff methods would be inefficient to both forwarders and carriers in terms of cost and transit time. The forwarders discuss various tariff stopoff provisions which have enabled smaller forwarder terminals to move freight directly in rail service. Should these charges be increased so that utilization of the provisions becomes uneconomical, then freight from and to the small terminals would be diverted to over-the-road movements. The forwarders further point out that cars placed for loading at a stopoff point in eastern or southern territory are subject to so-called "marriage rules" which provide separate charges ($22.40 in eastern territory and $21.43 in southern territory) in addition to stopoff charges. Thus, it is claimed that forwarders are

"doubly jeopardized" since the increase would apply separately to both charges.

The carriers respond to the forwarders' arguments by stressing the fact that use of stopoff provisions and marriage rules and charges results in more favorable line-haul rates than would otherwise be applicable on such shipments. Respondents also emphasize that the charge for "marriage" of cars is a separate matter, a charge which has been justified in the past on the basis of the additional expense involved in such service over and above that provided for actual stopoffs.

Protestants do not deny that the railroads' costs have increased. Stopping in transit for partial loading and unloading is a service which is beneficial to shippers, and no reason appears why this service should not bear a portion of the carriers' revenue requirements. In our judgment, the 6-percent increase proposed in the East is not excessive, and we find it to be just and reasonable. However, the proposal to increase stopoff charges to $50 per car in western and southern territory results in percentage increases far in excess of those herein proposed or authorized on other commodities and services. It is our view that the evidence of record is inadequate to justify increases of the magnitude proposed; accordingly, we conclude that charges for stopping cars in the South and West may be increased by 4 percent and 5 percent, respectively, the same percentages authorized for other traffic within those territories.

Lighterage.—Respondents propose an increase of 6 percent on lighterage service. Protestants, Port of New York Authority and the city of New York, request that no increase be permitted in the charges of the Penn Central Transportation Co. (Penn Central) for lighterage service at New York Harbor. By decision served March 28, 1972, the Commission, division 2, authorized Penn Central to establish charges of $6.26 and $5.97 per ton, respectively, on domestic and waterborne lighterage traffic in lieu of the higher charges proposed therein. I. & S. Docket No. 8645, Charges at New York Harbor, Penn Central Transportation Co., decided March 21, 1972 (petitions for reconsideration are pending).

In arriving at the charges of $6.26 and $5.97 per ton, the Commission found that these amounts reflected specific costs of the services involved. Protestants feel the same reasoning and logic require disapproval of the 6-percent increase here proposed. They contend the record in I. & S. No. 8645 contains evidence of costs and operations as recent as August 1971, and that it would, therefore, be inappropriate to grant further increases.

Respondents recognize that the charges approved in I. & S. Docket No. 8645 are based on specific costs of performing the involved services. However, they contend that the costs used to justify the charges were based on 1969 operations and no attempt was made to reflect the wage and price increases which formed the basis for the increases authorized in Ex Parte Nos. 265 and 267. Respondents also show that since 1969 there have been increases in the expense of performing the services under consideration. Two of the most prominent items of cost lie in the stevedoring labor at railroad and steamship piers. Shown below are the contract rates paid for each of these services over the past few years.

Jersey Contractors (Greenville Piers, N.J.)

Year	Boxcars	Percent	Open top	Percent
	Cents		*Cents*	
1969	240 NT	100	181 NT	100
1970	269 NT	112	203 NT	112
1971	296 NT	123	223 NT	123
1972[1]	314 NT	131	236 NT	130

[1]Effective January 1, 1972.

Wm. Spencer & Sons Corp.[1]

Year	Eastbound	Percent	Westbound	Percent
	Cents		*Cents*	
1969	217 NT	100	265 NT	100
1970	226 1/2 NT	104	276 1/2 NT	104
1971	240 1/2 NT	111	293 1/2 NT	111

[1]To October 1, 1971, thereafter, New York Terminal Conference, F.M.C. Lighterage Tariff No. 3, October 1, 1971.

Thus, on domestic lighterage traffic in boxcars, the labor cost involved in the transfer between car and lighter has increased 74 cents per net ton since 1969, whereas the proposed 6-percent increase applied to the approved charge of $6.26 per ton would amount to 38 cents per ton. Similarly, the proposed 6-percent increase if applied to the sum of the charges of $5.97 per ton for waterborne lighterage traffic and $3.20 per ton on all waterborne traffic would amount to 55 cents per ton.

In light of the recent increases authorized in I. & S. No. 8645 and record before us, we conclude that no increase should be authorized on this service.

Perishable protective service.—Respondents propose to increase the charges on mechanical protective service, water-ice and salt (ice bunker) protective service, and heater protective service by 6 percent. Charges for detention of the cars used for this service are proposed to be increased by a similar amount.

Protestants include shippers and groups concerned with movement of fresh and frozen fruits and vegetables, as well as meats, and they contend that mechanical protective service charges and water-ice protective service charges should be exempted from this proceeding or denied.

Protestants point out that division 2, in *Mechanical Protective Serv. of Perishables—Nationwide*, 340 I.C.C. 470 (1972), found that increased charges for mechanical protective service were not shown to be just and reasonable. Further, they observe that the pending docket No. 35400, Increased Charges for Perishable Protective Service, involves increased charges for water-ice refrigeration. Therefore, according to protestants, the instant proceeding is not the proper forum to determine what the level of these charges should be. Also, protestants argue that these protective service charges should not contain a penalty or detention charge to secure release of the car as here proposed, but only a charge based on costs for use of the car by shippers beyond the alloted free time. Respondents reply that the increase sought in *Mechanical Protective Serv. of Perishables—Nationwide, supra,* was denied because it was based on a formula designed to restructure the mechanical refrigeration rates, which formula was found defective, not the need for an increase. Also, they claim that increases are proposed on icing services in this proceeding because the railroads must have additional revenues to meet increased costs while the other formal docket is being processed. Thus, consideration and approval of the proposed increases in this respect, assertedly, should not be barred in the instant general revenue proceeding.

Protestants complain that numerous icing stations are being phased out. For example, since 1960, the 18 principal railroads have reduced the number of icing stations from 317 to 168, which reduction in service is allegedly tantamount to increases in rates, even though the rates per se have not increased since 1956. Respondents, on the other hand, stress that the need for icing

stations has diminished, primarily on account of the displacement of ice bunker cars with mechanical refrigeration cars to protect perishable traffic.

Both sides have introduced conflicting evidence as to the cost of providing perishable protective service by the railroads.

In *Mechanical Protective Serv. of Perishables—Nationwide, supra,* prior attempts to increase rates on perishable protective service in general revenue proceedings was discussed at page 479, as follows:

> • • • it became apparent that increases in protective service charges would not be permitted in the absence of an elaborate cost presentation. Such a presentation is not susceptible to use in general increase cases which are primarily revenue need cases.

We affirm that conclusion here; and, accordingly, the proposed increases on perishable protective services, including proposed increased detention charges, will be ordered canceled.[20]

COMMODITY GROUPS

• • • • •

Secondary materials.—Increases proposed on secondary materials, including waste or scrap paper, textile waste, nonferrous

metallic scrap, and rubber or plastic scrap or waste, are set forth below:

Paper, waste or scrap	On rates subject to minimum weights less than 80,000 pounds, 8 percent;
	On rates subject to minimum weights 80,000 pounds or more, 3 percent.
	Shipments moving wholly between points on the Florida East Coast Railway, no increase.
Textile waste	6 percent, except from, to, and within the South no increase.
Nonferrous metallic scrap	5 percent, except within East or from South to East 4 percent; to South 3 percent; within the South no increase.
Glass scrap or waste Rubber or plastic scrap or waste	4 percent, except to or within the South 3 percent.

Shippers of secondary materials state these waste commodities are extremely low valued and that transportation charges are determinative of whether they can be marketed. Protestants allege that an increase in rail rates will either bring about diversion of these articles to highway transportation or they simply will not move, in which case the environment will suffer. Protestants further allege that both present and proposed rates reflect a bias in favor of competing virgin materials since rates on secondary materials represent too high a percentage of the value of such waste commodities. Finally, protestants question the propriety of the 8-percent increase proposed for paper, waste or scrap, which presently moves on 40,000- and 50,000-pound rates, since only a 3-percent increase is proposed on rates subject to minima of 80,000 pounds and more.

The salvage industry consisted in 1967 of 7,927 establishments, employing 79,000 people and with total sales of $4.4 billion. Of these establishments, 3,862 were primarily engaged in handling iron and steel scrap and 4,075 were primarily engaged in handling nonferrous metals and other secondary materials. Iron and steel scrap accounted for almost one-half of the total sales and copper scrap about one-fifth.

Commodity	Sales ($000)	Percent of total
Iron and steel scrap	2,166,940	48.7
Copper-base scrap	895,474	20.1
Wastepaper	378,019	8.5
Waste rags, textile waste, wiping cloths	316,377	7.1
Aluminum scrap	233,820	5.3
Lead scrap	94,989	2.1
Zinc scrap	29,334	0.6
Other nonferrous metallic scrap	227,362	5.1
Other scrap and waste materials	111,358	2.5
Total	4,453,673	100.0

The market for secondary materials is generally characterized by a large number of relatively small sellers and a smaller number of relatively large buyers. The sellers, who deal in raw material substitutes, have minimal influence on prices and thus must accept the price offered by the purchaser. This price is basically determined by demand, which in turn is influenced by general economic conditions and the relative availability and cost of primary materials. Largely because of the nature of the seller/buyer relationships and changes in demand, secondary material prices exhibit a high degree of volatility, fluctuating from day to day, week to week, or month to month. This is in sharp contrast to relative stability in the market for the corresponding primary materials.

Price of secondary materials are quoted in various ways. Depending on the commodity, the freight may be paid by the buyer or the seller. Where the seller pays the freight, he tends to protect his earning situation by lowering the price which he is willing to pay to the collector or other source of the scrap. These sources, large in number and individually small in size, have little or no influence on the prices they receive. Due to the low value of these waste commodities, freight rates tend to represent a high percentage of the prices. Protestants maintain that increases in rail freight rates thus tend to elevate prices beyond the level which purchasers are willing to pay, thereby causing these commodities to move by truck or not to move at all. Thus, protestants submit that the recent series of general rail freight rate increases, totalling approximately 40

percent, have prevented over 1 billion pounds of textile wastes from moving to potential consumers.

Protestants state that less than 3 percent of the potential tonnage of textile waste is moved in commerce, and only a fraction of this is moved by rail. Freight charges average 20 to 30 percent of the total sales price of textile products. In some high volume items, freight charges are as much as 60 to 70 percent of the sales price. Thus, the sales price of mixed synthetics is about $2.30 per hundredweight, whereas the freight rate from Buffalo, N.Y., to Arrowhead, N.Y., is $1.11 per hundredweight, or 48 percent of the sales price. Similarly, on sweepings from Buffalo to Toronto, Canada, the sale price is $1.75 per hundredweight and the freight rate is $1.37, which equals 78 percent of the price.

Respondents presented the following table to show that prices on wiping materials range from $10.50 to $20 per hundredweight, and that prices have risen.

Waste material prices—wiping materials New York

	Cents per pound	
	February 1970	December 1971
No. 1 White wipers	16 -17	17 -18
No. 2 White wipers	13 -14	13½-14½
No. 3 White wipers	9 - 9½	10½-11
No. 1 ganzies, selected	18½-19	19 -20
No. 2 ganzies	14 -15	15 -16

However, protestants urge that textile wastes consist of far more roofing rags, shredding rags, fiber rags, and cuttings than wiping material. The tables shown below demonstrate the market value for these bulk grades and various grades, after sorting, and the relationship of freight to value. "Carload Waybill Statistics, 1969," public statement TD-1, indicates the average haul of textile waste to be 527 miles at an average tonnage of 24.7. The applicable rate for this average haul, from Agent Mauer's Tariff E-2009-series, of 63 cents per hundredweight, minimum weight 50,000 pounds, would produce charges of $315 per car. Protestants have used this rate in computing the percentages of freight to value in the tables below.

Mixed rags	Price per hundredweight		Percentage of freight to value	
New York		$2.50		25.2
Boston		2.50		25.2
Chicago		2.25		28.0
Philadelphia		2.00		31.5
Roofing rags	*New York*	*Chicago*	*New York*	*Chicago*
No. 1	Nominal	-------	-------	------
No. 2	-- do --	0.55	-------	114.5
No. 3	$.40	0.35	157.5	180.0
Cloth strippings	1.25	-------	50.4	------
No. 1 laundry nets	8.25	8.75	7.6	7.2
Mixed laundry nets	6.50	5.50	9.6	11.4
Mixed cotton, overalls/pants	2.50	3.00	25.2	21.0
No. 1 old blue overalls	3.00	3.50	21.0	18.0
New cotton cuttings				
No. 1 white shirts		8.90		7.8
Unbleached muslin		11.50		5.4
White shirt for export		4.75		13.2
No. 1 percales		4.00		15.75
No. 1 washable		2.50		25.2

The volume of wastepaper and board recycled annually over the past 10 years has averaged about 11 million tons. This represents about 20 percent of wastepapers generated annually and about 22 percent of the paper and board industry fiber requirements. There are more than 50 defined grades, each with its own fiber characteristics and market supply demand situation, and they range widely in price, from $2 per ton on No. 1 mixed paper to $80 per ton on manila tab cards. Respondents maintain that freight rates are not the controlling factor in marketing wastepaper. More than any other factor, the market price of the competitive virgin fiber, woodpulp, is allegedly determinative of whether wastepaper can be marketed. Moreover, factors such as segregation of wastepaper from other refuse and baling and preparing for shipment also bear an important part of the cost of marketing wastepaper.

In 1966, the railroads transported 7,768,023 tons of wastepaper. The volume rose to 8,064,428 tons in 1970, although there were four general freight rate increases during this period. Protestants state that freight rates on wastepaper have increased 31 percent beginning with Ex Parte No. 265 and including Ex Parte No. 267. However, respondents point out that because of the incentive rates which the carriers have made available to shippers of wastepaper, the rates per 100 pounds are today only slightly higher than the lowest available rates in 1964. The 80,000-pound incentive loading rates were estab-

lished May 10, 1964. More recently, incentive loading rates have been published subject to minima of 100,000 and 125,000 pounds. These rates are differentially lower than the 80,000-pound rates.

The table below shows the rates between representative points in 1964 at the Ex Parte No. 223 level and compares them with the rates presently in effect at the Ex Parte No. 267 level:

Comparison of rates on wastepaper in effect May 9, 1964, versus present rates at X-267-B level

From	To	28300 miles	Minimum weight	Effective May 9, 1964 X-223	Present X-267-B
Akron, Ohio ----	Coshocton, Ohio--	74	40M	22½	32
			50M	20½	28
			80M	--------	23
			100M	--------	21
Do ----------	Baltimore, Ohio --	109	40M	27½	38
			50M	24½	34
			80M	--------	28
			100M	--------	26
Dayton, Ohio ---	Gypsum, Ohio----	150	40M	29½	40
			50M	26½	37
			80M	--------	32
			100M	--------	28
Landover, Md---	Lynchburg, Va ---	171	40M	32½	44
			50M	29½	40
			80M	--------	34
			100M	--------	33
Chicago, Ill ----	Vincennes, Ind---	241	40M	38½	54
			50M	34½	47
			80M	--------	40
			100M	--------	37
Gypsum, Ohio---	Boston, Mass ----	712	40M	65½	89
			50M	59½	81
			80M	--------	70
			100M	--------	62

The data above shows that from Akron, Ohio, to Coshocton, Ohio, the lowest available rate on wastepaper in effect May 9, 1964, at the Ex Parte No. 223 level was 20 1/2 cents per hundredweight. Seven years later, despite the intervening increases in rail freight rates, the lowest available rate per hundredweight is 21 cents, an increase of only one-half cent over this period in the rate per 100 pounds. The rate of 20 1/2 cents applied on shipments subject to a minimum weight of 50,000 pounds; the rate of 21 cents applies on shipments subject to a minumum weight of 100,000 pounds. Using the longer haul from Gypsum, Ohio, to Boston, Mass., the lowest available rate on May 9, 1964, at the Ex Parte No. 223 level was 59 1/2 cents (50,000 pounds minimum weight). Seven years later the lowest rate is 62 cents (100,000 pounds minimum weight).

Similarly, the nonferrous metal and alloy scrap industry has been granted downward rate adjustments throughout official territory. Incentive rail rates were established in 1963 covering a complete list of nonferrous metal scraps with minimum weights ranging from 40,000 to 80,000 pounds. Effective December 10, 1969, the eastern railroads published a further downward revision in the overall rate levels by establishing 100,000- and 120,000-pound incentive rate scales. These incentive rate scales and the lower rate levels resulted in an average load within official territory of 84,000 pounds on all nonferrous scrap metal, waste or tailings. The 120,000-pound rate level is relatively the same or below the rate level applicable approximately 9 years ago. In response to protestants' contention that nonferrous metal or alloy scraps are low value commodities which cannot absorb increases in freight rates, respondents have submitted the following quotations to demonstrate that many scrap metals have increased in price during the past 9 years:

Nonferrous metal scraps New York dealers buying prices in wholesale lots (cents per pound)

	Column 1 February 1963	Column 2 December 1971	Column 3 Increase or decrease
			Percent
No. 1 heavy copper and wire	24 -24½	33 -34	+38.8
No. 2 heavy copper and wire	22 -22½	29 -30	+33.3
Light copper	19¾-20¼	27 -28	+38.3
No. 1 composition	20¼-20¾	29 -30	+44.6
Brass pipe	16 -16½	19 -20	+21.2
Auto radiators (unsweated)	15¼-15¾	21 -22	+39.7
Cocks and faucets	16½-17	20 -21	+23.5
Heavy yellow brass	14¼-14½	18 -19	+31.0
Soft scrap lead	6 - 6½	4 - 4½	-30.8
Battery lead plate	2 - 2½	---- - 1	-60.0
Clean hand picked type shells	5½- 6	6 - 6½	+ 8.3
Old zinc	3 - 3¼	3 - 3½	--------
New die cast scrap	2¾- 3¼	3 - 3½	+ 7.7
New zinc clipping	5 - 5¼	6 - 6½	+23.8
Old die cast scrap	1¾- 2	2 - 2¼	+12.5
Block tin pipe	80 -85	110 -115	+35.3
No. 1 pewter	---- -60	72 -75	+25.0
No. 1 babbit (high grade)	---- -40	---- ----	--------
Solder joints	12 -21½	---- ----	--------
Pure nickel clips	53 -54	70 -75	+38.9
Rolled nickel anodes	55 -56	75 -85	+51.8
Nickel rod ends	53 -54	74 -85	+57.4
Nickel turnings	40 -41	55 -60	+46.3
New monel rods	25 -26	45 -50	+92.3
New monel clips	25 -26	48 -53	+103.8
Monel cast	20 -21	42 -48	+128.6
2S aluminum clippings	9¾-10¼	7½- 8	-23.8
Old aluminum sheet	7 - 7½	5½- 6	-20.0
Monel sheet	25 -26	42 -48	+84.6
Brass rod ends	---- ----	25 -26	--------

Nonferrous metal scraps Pittsburgh dealers buying prices in wholesale lots (cents per pound)

	Column 1 February 1963	Column 2 December 1971	Column 3 Increase or decrease
			Percent
No. 1 heavy copper and wire	22¾-23	38 -39	+69.6
No. 2 heavy copper and wire	21 -21¼	32 -33	+55.3
Light copper	19 -19¼	29 -30	+55.8
No. 1 composition	20½-20¾	30 -31	+49.4
No. 1 composition turnings	20 -20¼	---- ----	----
Auto radiators	15 -15¼	23 -24	+57.4
Yellow brass	13 -13¼	19 -20	+50.9
New brass clippings	17¾-18	24 -25	+38.9
No. 1 brass rod turnings	14½-14¾	22 -23	+55.9
Aluminum castings	7½- 8	5½- 6½	-18.7
Aluminum borings and turnings	5¼- 5½	4 - 5	-9.1
Old zinc	3 - 3¼	4 - 5	+53.8
New zinc clippings	5¼- 5½	8 - 8½	+54.5
New die cast scrap	3½- 4	3 - 3½	-12.5
Type metal	7½- 7¾	9 -10	+32.1
Soft scrap lead	6½- 6¾	7½- 8	+18.5
Battery lead plates	----- 2	2 - 2¼	+12.5
Monel metal	23 -24	23 -24	+95.8
Cocks and faucets	---- ----	22 -23	----
New brass clippings	---- ----	24 -25	----
Mixed aluminum clips	---- ----	8 - 9	----

Source: Secondary raw materials—Publication of the waste trade industry.

Protestants contend that the existing rate structure discriminates against secondary materials in favor of virgin raw materials and that the degree of discrimination has been compounded in recent years by Commission approval of flat percentage increases. Thus, in 1960, nonferrous scrap metal was charged an average of approximately 13 cents more per hundredweight than the ore of the same metal. The differential today is approximately 18 cents per hundredweight. Freight rates from the South and Southwest to major consuming markets in official territory are now between 1 and 1 1/2 cents per pound for metal scrap; this represents 2 to 5 percent of the delivered value of copper scrap, 8 to 15 percent of the delivered value of aluminum scrap, and 10 to 20 percent of the delivered value of stainless steel scrap. Respondents maintain that the comparison of rates on ores and concentrates with rates on nonferrous metal scrap is inappropriate because it compares 100 percent metals with ore or concentrates from which only a limited amount of metal can be recovered. Furthermore, the rail transportation characteristics of nonferrous metal scrap and ores or concentrates differ, for example, as to type of equipment, average loadings, and average hauls.

The following table is submitted by protestants to demonstrate rate bias existing against textile waste and in favor of competitive virgin materials within official territory:

Commodity	Value per hundredweight	Miles	Present rate	Proposed increase	Proposed rate	Percent of freight to value
			From Franklin, Ohio, to Adams, Mass.			
			Hundredweight	*Percent*	*Hundredweight*	
Rag pulp	$27.50	699	115¢	3	118¢	4.2
Rag (unbleached muslin)	11.50	699	80¢	6	85¢	7.3
			From Franklin, Ohio, to Turner Falls, Mass.			
Rag pulp	21.25	730	116¢	3	119¢	5.6
Rag (No. 1 percales)	4.00	730	81¢	6	86¢	21.5

As stated, the average loading for textile wastes is about 24.7 tons per car. The value of a carload of textile waste would be $5,500 as a minimum, according to respondents, whereas the application of a 6-percent increase within the East results in an average increase of $18.67 per car.

The many grades of paper waste are generally divided into five broad classes: mixed, news, corrugated, high-grade pulp substitutes and high-grade drinking. Under most market conditions, the latter two classes have very little difficulty in moving substantial distances in competition with virgin woodpulp. In a poor market, the mixed classes, and to some extent the news and corrugated classes, face difficulty in moving. These grades also constitute the largest volume of wastepaper and paperboard available for recycling or for disposal as solid waste. The controlling factor in the movement of the lower grades would appear to be the fiber demand at the consuming mills, along with the available supply and price, of virgin wood fiber. Protestants, however, contend that freight rates create a bias against wastepaper and in favor of virgin pulp. Thus, wastepaper has a selling price of about $40 per ton, and transportation costs approximate 75 percent of the value. Pulp, on the other hand, moving at 20 cents less per ton, has a selling price of $175 per ton, and the ratio of freight expense to price is only 17 percent.

Origin/destination	Woodpulp			Wastepaper		
	Cost per ton	Selling price[1]	Percent of freight to selling price	Cost per ton	Selling price[2]	Percent of freight to selling price
Portland, Oreg., to Fort Howard, Wis----	$29.80	$150.00	20	$30.00	$19.00	157
Los Angeles to east coast----------	31.60	150.00	21	42.20	19.00	222
Phoenix, Ariz., to Denver, Colo--------	23.20	150.00	15	30.00	19.00	157
San Antonio, Tex., to Santa Clara, Calif---	27.80	150.00	18	30.80	19.00	162

[1] Unbleached kraft.

[2] Corrugated containers.

Respondents maintain that any comparison of rates on woodpulp and wastepaper must take into consideration factors such as length of haul and revenue per car. The average length of haul on woodpulp is 865 miles, compared to 329 miles on wastepaper; the average revenue per car on woodpulp is $663 compared to only $247 on wastepaper. Respondents refer to the 100,000- and 125,000-pound incentive loading rates which are only slightly higher than the rates per 100 pounds available in 1964, despite the intervening ex parte increases. Respondents urge that scrap paper will still retain a significant rate advantage over woodpulp; it will also retain a significant rate advantage over pulpwood because it takes about three to four tons of pulpwood to make one ton of woodpulp, while scrap paper is converted on almost a one-to-one ratio. Thus, respondents do not expect the proposed increases to inhibit the movement of scrap paper.

Protestants forecast diversion of waste and scrap paper to motor carriers and a 30-percent decrease in rail tonnage if the proposed increase is allowed on the 40,000- and 50,000-pound minimum weight rates. Public statement TD-1 shows the average length of haul for wastepaper within official territory was 377 miles. Protestants aver that such a short distance makes the traffic highly susceptible to diversion, citing the dissenting opinions in Ex Parte No. MC-85, *Transportation of "Waste" Products for Reuse*, 114 M.C.C. 92, 112 and 119.

Over the years 1967 to present, during which time there were several general increases in rates, the movement of scrap paper by rail has increased. Thus, the Southern Railway handled 430,000 tons of scrap paper in 1967, and approximately 530,000 tons in 1971.

During that time there was an increase in the tonnage each year. The volume of scrap paper handled by other major southern railroads shows a similar trend. In 1967, the Louisville & Nashville, Illinois Central, and Seaboard Coast Line handled 789,000 tons of waste and scrap paper, and that increased to 1,127,000 tons in 1971. The movement of scrap paper has also grown in the Nation as a whole between the years of 1967 and 1970 from 7,243,289 tons to 8,064,428 tons:

Wastepaper

Year	Carloads	Tons
1967	---------	7,243,289
1968	222,452	7,710,560
1969	228,997	7,976,596
1970	220,361	8,064,428

The reduction in cars in 1970 with a corresponding increase in tonnages is attributed to incentive loading rates established by the railroads.

While respondents propose to apply a 6-percent increase on textile wastes moving within and between territories other than Southern Freight Association territory, this proposal will not affect movements originating in the South where about two-thirds of the total textile wastes are presently produced. No increase is to be applied to textile wastes moving from, to, and within the South. Over the last few years, fluctuations in the movement of textile wastes by rail in the South have generally followed textile production. Southern carriers acknowledge that for the shorter distances this low value traffic is highly susceptible to diversion to motor common carrier and private motor carriage.

Protestants point out that the increase sought on the 40,000 and 50,000 pounds minima for wastepaper is 8 percent and only 3 percent is sought on rates subject to minimum weights of 80,000 pounds and more. The 3-percent increase is proposed in order to encourage use of the heavier incentive loading rates. Respondents contend the necessity for the 8-percent increase on the lower minima is borne out by the low per car earnings resulting from these rates and minimum weights. The average haul for scrap paper is 329 miles, and for that distance the 40,000 pounds rate is 59 cents and the 50,000 pounds rate is 54 cents. Accordingly, the per-car earnings at these rates are $236 and $270, respectively. These earnings are to be compared to the average per-car earnings on woodpulp of $663. As pointed out above, a substantial portion of the

wastepaper traffic moves under the incentive 80,000 and 100,000 pounds rates on which the proposed increase is 3 percent.

We are not convinced on this record that the considered secondary materials should be exempted from any increase. On the other hand, the low value of these articles, the relatively high percentage of freight charges to sales price, and their generally favorable transportation characteristics, appear to warrant some limitation upon the proposed increases. Balancing these factors against the carriers' need for additional revenue, we conclude that the increase on paper waste or scrap, textile waste, nonferrous metallic scrap, and glass, rubber or plastic scrap or waste shall not exceed 3 percent. This limitation will also have a beneficial effect upon the environment. While we have concluded elsewhere that secondary materials would continue to move despite the proposed increases, the holddown here imposed should encourage the movement and recycling of these commodities.

* * * * *

Ferrous scrap, pig iron, and crude metallic iron or iron pellets.—The increase proposed on iron and steel scrap, pig iron, and crude metallic iron or iron pellets is 5 percent, except within the East or from the South to the East the increase proposed is 4 percent, and except to or within the South the increase proposed is 3 percent, minimum 15 cents per ton. The scrap iron and steel industry and one steel company (which uses scrap exclusively)

contend that scrap iron and steel is directly competitive with iron ore as an input for the steelmaking process and that any increase in scrap iron rates must be limited to that proposed on iron ore. Protestants, therefore, feel they are entitled to receive within the East the same 22 cents per gross ton maximum proposed on iron ore. Otherwise, it is alleged, scrap iron will be unjustly discriminated against, it will be less attractive in the market place, and the end result will be detrimental to the environment. Pig iron producers request that the Commission preserve the identity of treatment between pig iron and ferrous scrap in the event the Commission assigns a holddown to scrap for environmental reasons.

In *Institute of Scrap Iron & Steel, Inc.*, v. *Akron, C. & Y. R.*, 316 I.C.C. 55 (1962), division 2 concluded that the transportation characteristics of iron ore, pig iron, and scrap differ widely, and that there is no justification from a transportation standpoint for requiring a rigid relationship between the rates on scrap and the rates on iron ore or pig iron. Protestants, however, cite our conclusions in Ex Parte No. 256, *Increased Freight Rates, 1967*, 332 I.C.C. 280, to support their contention that the competition between iron ore and scrap requires identical rate treatment. Based on the modest record in that proceeding, we found that iron ore subjected to adequate beneficiation could be used interchangeably with scrap or pig iron in the steelmaking furnace, and we directed that the increases on scrap be held to those permitted on iron ore.

On the basis of a more complete record in Ex Parte No. 259, *Increased Freight Rates, 1968*, 332 I.C.C. 714, we concluded that scrap iron competes in the steelmaking furnace with pig iron and prereduced iron pellets having iron content of over 90 percent, and that iron ore is the primary component of the charge in the blast furnace, which produces pig iron. We permitted the application of a uniform increase of 5 percent, maximum 20 cents per ton to each commodity. In Ex Parte No. 262, *Increased Freight Rates, 1969*, we also found that a uniform percentage increase applied to the basic rates on both scrap iron and iron ore was equitable to both.

In Ex Parte No. 265 and Ex Parte No. 267, *Increased Freight Rates, 1970 and 1971, supra*, we recognized that the competition of ferrous scrap is with pig iron and prereduced iron pellets as inputs for the steelmaking furnace. We found that iron ore and iron ore pellets having iron contents of less than 73 percent are distinct from any of these products, and are not used directly in the steelmaking process but must undergo processing to be concentrated into iron pellets with an iron content sufficiently high to be used, like scrap or

pig iron, in the making of steel, or must be processed in blast furnaces to make pig iron. We commented:

> There are differences in the transportation service performed by the railroads in connection with ferrous scrap and iron ore, including differences in the average length of haul, average weight per car, average size of shipment, and regularity of movement and general distribution. Evidence offered by the protestants, including testimony of expert witnesses, generally to the effect that all metallic sources compete, is not persuasive of their contention that scrap iron and iron ore specifically and directly compete to the extent that they require similar rate treatment. In the light of the demonstrated intervening processing required of ore to transform it into a competing product, we adhere to our conclusions in *Institute of Scrap Iron & Steel, Inc., v. Akron, C. & Y. R.*, 316 I.C.C. 55.

The increases approved on commodities generally, including iron ore and iron ore pellets, in Ex Parte No. 267 were 14 percent within the East, 6 percent within the South, and 12 percent within the West and interterritorially. We concluded, however, that because Ex Parte No. 267 was supported in part by the need of the railroads for the improvement of their net revenues, that some allowance should be made for environmental considerations. For this reason the maximum increases allowed on iron and steel scrap was 11 percent. Because of the competition shown with iron and steel scrap, the increases granted on pig iron and iron pellets (or crude metallic iron) were also held to an 11-percent maximum.

The Institute of Scrap Iron and Steel, Inc. (the Institute), and Northwestern Steel and Wire Company request that the 22 cents per gross ton maximum increase proposed on iron ore also be applied to movements of ferrous scrap. The Institute maintains that iron ore and ferrous scrap are the basic metallic ingredients for the steelmaking process, that pig iron and hot metal, products of the blast furnace, are simply iron ore once removed, and that in every method of steelmaking currently employed, the steel manufacturer can use either iron ore or scrap iron interchangeably as a raw material in the making of new steel. Protestant concludes that since iron ore and ferrous scrap are the only sources of iron units (Fe), they are competitive and require the same rate treatment. Protestant further urges that a greater increase on scrap iron rates than on iron ore rates would inhibit the recycling of scrap and thus have a negative impact on the environment.

Respondents note that although the Commission concluded that there was no showing in Ex Parte No. 267 that the level of freight rates had anything to do with the removal of ferrous refuse, such as

abandoned automobiles, it nevertheless decided that some allowance should be made for environmental considerations, particularly since the railroads therein were seeking to improve their net revenues as well as to cover additional costs. However, respondents point out that here the additional revenues sought are insufficient even to cover increased costs. The proposed increase on scrap iron and steel is a vital part of the railroads' revenue program. As set forth in the following table, over one-half of the revenue derived from the proposed increase by the seven principal scrap-carrying eastern lines would accrue to such carriers as the Penn Central and the Reading, both which are in reorganization.

Scrap iron handling and revenue for principal iron and steel rail carriers

Railroad	October 1, 1970, to September 30, 1971		
	Carloads	Net tons	Total revenue
B&O	41,762	2,442,189	$14,004,920
B&LE	3,205	189,013	428,804
C&O	24,213	1,263,889	8,168,738
EL	12,794	706,515	2,752,117
N&W	28,325	1,609,700	6,056,089
PC	182,492	10,273,052	43,228,210
Rdg	22,182	1,305,058	3,570,413
Total	314,973	17,789,416	78,209,291

Respondents state that generally an abandoned automobile will provide 1.5 tons of ferrous scrap; refrigerators and other appliances will provide substantially less. In the former case, a 4-percent increase would mean about 34 cents per ton in the total cost of gathering and selling scrap. Respondents contend this increase is of no consequence in the context of a commodity that varies in price in terms of dollars from month to month and that varies by as much as $15 per ton from 1 year to the next.

The vast majority of the scrap iron consumed emanates within the steel mills in the form of home or revert scrap. This material arises because ingots must be cropped during rolling, because a part of the steel production may be defective, and for other reasons. The result is that the home scrap is available to be directly recycled into steel. At present, approximately 60 percent of the entire scrap volume used originates within the mills as home scrap. Because it is already

on site and is a valuable waste product, the mills generally recycle this scrap in preference to all other sources.

Contrasted with home scrap is the broad classification of purchased scrap. By definition, purchased scrap is that originating outside the mills for which a negotiated price is paid per iron unit. Purchased scrap arises from two distinctly different sources. The primary grouping, prompt industrial scrap, is created by steel fabricators such as automobile manufacturing plants in their operations. This material generally must be removed expeditiously to prevent interruption to the fabricating process. Because it has a known chemical composition, industrial scrap almost always re-enters the steelmaking cycle with little or no difficulty. Thus, this type of scrap does not constitute an environmental problem.

The second type of purchased scrap is obsolete scrap. This product results from the wearing out, corroding, breaking, deteriorating, or other obsolescence of an item which was discarded. Obsolete scrap generally does not possess the economic advantages of industrial scrap. It is not concentrated at particular geographic sites such as fabricating shops or plants. Its chemical composition is not precisely known, and ordinarily it is not easily processed to produce a metallurgically acceptable product for recycling into new steel. In the case of the junk car, and more particularly the abandoned junk car, to which much attention has been directed in the past several years, the real breakthrough has been a technological one. The scrap shredder or fragmentizer, by creating a higher quality scrap with fewer contaminants, has made possible the increased use of junk car scrap by both steel mills and foundries. The principal area of concern, among Federal and State agencies, is the removal of legal barriers to the fairly prompt disposal of abandoned cars. In any event, it is doubtful whether a significantly faster rate of junk car disposal would have occurred without these two events, regardless of the freight rate on ferrous scrap or on the junk car bulk.

Purchased scrap accounts for approximately 40 percent of the total scrap charge, with industrial scrap accounting for about 16 percent of the total and obsolete scrap about 24 percent. In 1971, consumption of obsolete scrap was about 19 million short tons. This compares with about 80 million tons of pig iron consumed.

Freight rates on ferrous scrap are usually absorbed by the seller to meet competition. Since the seller pays the freight, he tends to protect his earnings situation by lowering the price which he is willing to pay to the collector or other source of the scrap. These

sources, large in number and individually small in size, have little or no influence on the prices quoted.

To establish the existence of freight rate discrimination between iron ore and ferrous scrap, protestants aver that there has been a steady decline in the movement of recyclable scrap and a steady decline in price. Respondents disagree. If the contentions of the scrap industry were true, respondents maintain, the result would have been a steady decline in the movement of scrap over the period 1967 to present when freight rates were rising, and a steady decline in price.

The price of scrap iron in the market place fluctuates with no apparent relationship to freight rates or freight rate increases. The following table shows composite prices for scrap iron, pig iron, and iron ore for 1957-1970. During this entire period, prices of pig iron and iron ore remained relatively stable, but the prices of scrap fluctuated from a low of $25.94 per ton to a high of $47.10 per ton. More to the point, there were no general freight rate increases during the period 1961-66, yet the composite price of No. 1 heavy melting scrap during that period fluctuated between $26.89 per ton and $36.37 per ton, a variation of almost 36 percent. On the other hand, the price of No. 1 heavy melting scrap rose from $27.63 to $41.25 per ton in the last 4-year period shown, when successive freight rate increases were being applied. The composite price of No. 1 heavy melting scrap declined from 1966 to 1967 and from 1967 to 1968. The Ex Parte No. 262 increase became effective in late 1969. That 6-percent increase applied to both iron and iron ore. In 1969, however, the composite price increased to $30.56 per ton and, in 1970, to $41.25 per ton.

Prices of iron and steel No. 1 heavy melting scrap, iron ores, and pig iron

	No. 1 heavy melting[1]	Pig iron	Mesabi Bessemer iron ores	Mesabi non-Bessemer iron ores
	in dollars per ton of 2,240 pounds			
1957	47.10	63.82	11.60	11.45
1958	37.81	65.95	11.60	11.45
1959	37.69	65.95	11.60	11.45
1960	33.20	65.95	11.60	11.45
1961	36.37	65.95	11.60	11.45

Prices of iron and steel No. 1 heavy melting scrap, iron ores, and pig iron—Continued

	No. 1 heavy melting[1]	Pig iron	Mesabi Bessemer iron ores	Mesabi non-Bessemer iron ores
	in dollars per ton of 2,240 pounds			
1962	28.34	65.46	10.80	10.65
1963	26.89	62.87	10.80	10.65
1964	36.50	62.75	10.70	10.55
1965	34.27	62.75	10.70	10.55
1966	30.66	62.75	10.70	10.55
1967	27.63	62.70	10.70	10.55
1968	25.94	62.70	10.70	10.55
1969	30.56	63.78	10.70	10.55
1970	41.25	69.33	[2]10.95	[2]10.80

[1]Composite averages of No. 1 heavy melting steel scrap prices at Pittsburgh, Philadelphia, and Chicago, compiled from monthly averages published by American Metal Market.
[2]Effective January 1, 1970.

Protestant notes the respondents' table of prices of the bellweather grade No. 1 heavy melting scrap stopped with 1970. Protestant added the price for the year 1971, $34.46, and the price for January 1972, $33.09. The effect is to establish that the price is down from 1970 to January 1972. Respondents note the composite price decline to $34.46 per ton in 1971 was a greater price difference than could be attributed to the amount of the increase in railroad freight rates. In addition, while protestant reports the composite price of $33.09 per ton in January 1972, the "Iron Age" issue of March 23, 1972, reports a composite price of $34.83 per ton. Thus, instead of a steady decline, the price of scrap iron continues to fluctuate both up and down with no discernible relationship to freight rates or freight rate increases.

The spread in monthly scrap prices for No. 1 heavy melting scrap is set out in the table below for each year 1955-70. The price of scrap swings significantly from month to month within any 1 year. These month to month fluctuations, ranging as high as $8.64 per ton, bear no relationship to changes in freight rates.

Composite Scrap Steel Prices[1]

Year	Greatest difference between months	Widest spread between consecutive months
	(dollars per gross ton)	
1955	15.62	4.20
1956	19.69	8.61
1957	26.68	8.64
1958	9.40	4.79
1959	11.00	3.78
1960	11.36	5.23
1961	8.09	5.56
1962	14.16	4.44
1963	3.42	3.09
1964	9.89	3.29
1965	8.32	3.21
1966	7.20	3.42
1967	3.14	1.75
1968	8.51	2.48
1969	9.03	3.05
1970	10.09	5.59

[1]Composite averages of No. 1 heavy melting steel scrap prices at Pittsburgh, Philadelphia, and Chicago, compiled from monthly averages published by American Metal Market.

Recent weekly issues of "Iron Age" quote per ton prices on No. 1 heavy melting scrap at Pittsburgh as follows:

Issue	*Price*
	Per ton
October 21, 1972	$34 - $35
November 18, 1971	33 - 34
December 16, 1971	31 - 32
January 13, 1972	35 - 36
February 17, 1972	37 - 38

Thus, without any change in freight rates, the price declined between October and December. It came back in January and rose still further in February, after the 2.5-percent surcharge went into effect.

The question remains as to the effect of various freight rates on the movement of these materials; or, more specifically, the deterrent effect of allegedly disparate rates on scrap movement. Where integrated steel producers are concerned, the consumption and demand for scrap is related in large part to their costs of

producing the competing primary material, hot metal (liquid pig iron) from iron ore. Despite changes in the relative importance of the various types of iron and steelmaking furnaces, particularly through the introduction of the basic oxygen converter, which is a relatively new user of ferrous scrap, variations in the total scrap (home and purchased)—pig iron proportions of the total metallic charge have tended to cancel each other out. In 1971, the ratio is almost exactly at the 50-50 level which has prevailed over at least the entire post World War II period. However, protestant shows purchased scrap declined as a percentage of the total furnace charge from 21.5 percent in 1957 to 19.4 percent in 1969.

Percent of scrap consumed to total furnace charge in all types of furnaces

Year	Purchased scrap	Home scrap	Total scrap
1956	25.3	26.4	51.7
1957	21.5	27.2	48.7
1958	21.8	27.8	49.6
1959	22.6	29.1	51.7
1960	19.8	30.1	49.9
1961	19.5	30.0	49.5
1962	19.0	30.8	49.8
1963	20.2	30.5	50.7
1964	18.7	30.8	49.5
1965	19.7	30.7	50.4
1966	20.0	30.0	49.9
1967	21.5	28.0	49.4
1968	18.9	30.3	49.2
1969	19.4	30.7	50.1

Respondents rebut this showing with evidence of increased total consumption of scrap iron in steelmaking furnaces. It is apparent from the table that the percent of scrap consumed fluctuates from year to year. The percentage moved up and down during the period 1961-66 when there were no general freight rate increases, and it continued to move in both directions in the period 1967-69 when there were a succession of increases. However, the table is misleading in terms of actual movement. Total scrap consumption in 1961 came to 64,327,000 tons. In 1969, however, total scrap consumption was 94,816,000 tons. Thus, the 19.4 percent use attributed to purchased scrap in 1969, according to respondents, represents substantially more in terms of actual tonnage of scrap

iron than did the 19.5 percent use of purchased scrap shown for 1961. Moreover, the table relates to domestice consumption only and does not take into account a significant increase in exported scrap iron which has occurred in the last few years. Protestant contends respondents' presentation misses the point that home scrap generally is not bought and sold as is purchased scrap and that the upward movement in scrap consumption has occurred as a result of the higher utilization of home scrap, produced and consumed within a single steel complex without rail transportation.

The following table, submitted by respondents, shows that between 1957 and 1969 scrap iron and steel consumption actually increased in terms of steel ingots produced, from 63.3 percent to 67.2 percent. There was also an increase in scrap consumption between 1967 and 1969 in the face of the increases granted in Ex Parte No. 265, Ex Parte No. 259, and Ex Parte No. 262. Thus, respondents' table shows that scrap consumption rises and falls with steel production.

Percent iron ore, pig iron and scrap consumption is of steel ingots

DOMESTIC PRODUCTION

Year	Steel ingots	Iron ore	Percent	Pig iron	Percent	Total scrap consumption	Percent
	In thousands of net tons						
1957	112,715	115,314	102.3	80,798	71.7	73,549	65.3
1958	84,310	76,101	90.3	58,808	69.8	56,360	66.8
1959	93,446	67,509	72.2	62,178	66.5	66,062	70.7
1960	99,281	99,438	100.2	68,566	69.1	55,469	67.0
1961	98,015	79,888	81.5	66,565	67.9	64,327	65.6
1962	98,328	80,448	81.8	67,595	68.7	66,160	67.3
1963	109,261	82,330	75.4	73,715	67.5	74,621	68.3
1964	127,075	95,016	74.8	87,800	69.1	84,626	66.6
1965	131,185	97,932	74.7	88,944	67.8	90,359	68.9
1966	134,072	100,965	75.3	92,157	68.7	91,583	68.3
1967	127,213	94,280	74.1	87,271	68.7	85,361	67.1
1968	131,098	96,168	73.4	89,890	68.6	87,060	66.4
1969	141,069	99,950	70.9	93,502	66.3	94,816	67.2

Source: "FACTS" issued by Institute of Scrap Iron and Steel, Inc., page 34, 31st edition yearbook, 1970.

Exports of scrap have been increasing gradually over the years from a level of a few hundred thousand tons per year in the early

1950's to a peak of 10.6 million tons in 1970. This export demand is partly a result of expansion of electric furnace capacity in other countries. Such demand is relatively inelastic since the United States is the principal exporter of iron and steel scrap. Total tonnages of nonhome scrap collections for domestic and export consumption are up about 50 percent from the late 1950's and early 1960's to 1969 and 1970. Scrap demand is based on economic variables, mainly steel demand. This changes, and scrap prices fluctuate. These fluctuations far outweigh proposed freight rate increases.

Over the past 15 years, the rate of scrap consumption in steelmaking has been relatively constant at slightly more than 50 percent of the total metallics used in the process. The balance is mainly blast furnace hot metal produced from iron ore. With the advent of continuous casting and other processes which improve the yield of acceptable product manufactured within the steel mills, less mill (home) scrap is being generated. On the other hand, the consumption of obsolete scrap is on the increase, primarily because motor vehicles are being scrapped and reprocessed at an increasing rate.

The quantity of scrap consumed domestically has varied between 94.8 million short tons (1969) and 56.4 million short tons (1958) during the period 1955-71. Since 1960, the quantity of scrap consumed has increased by 42.6 percent or an average of 4.3 percent per year.

Domestic consumption of iron and steel scrap

Year	*Thousand short tons*
1946	49,484
1947	60,864
1948	64,963
1949	54,338
1950	68,901
1951	76,728
1952	69,023
1953	77,130
1954	61,354
1955	81,375
1956	80,315
1957	73,548
1958	56,359
1959	66,061
1960	66,468
1961	64,326

Domestic consumption of iron and steel scrap—Continued

Year	*Thousand short tons*
1962	66,159
1963	74,620
1964	84,625
1965	90,359
1966	91,583
1967	85,361
1968	87,060
1969	94,816
1970	85,188
1971 estimate	80,000

Source: U.S. Bureau of Mines.

Protestant refers to scrap consumption in terms of percentages and states that purchased scrap is losing ground. Scrap tonnages give a different picture.

Total nonhome scrap consumption

Year	Domestic	Export	Import	Total
		Thousand short tons		
1951	37,881	245	416	38,542
1952	34,184	351	153	34,688
1953	35,439	309	173	35,921
1954	23,394	1,679	239	25,312
1955	35,735	5,129	228	41,092
1956	36,845	6,340	255	43,440
1957	31,086	6,765	238	38,089
1958	23,291	2,927	332	26,550
1959	29,043	4,939	309	34,291
1960	26,095	8,039	179	34,313
1961	25,305	9,195	270	34,770
1962	25,284	5,195	264	30,743
1963	29,432	6,368	217	36,017
1964	31,831	7,881	291	40,003
1965	35,804	6,174	212	42,190
1966	36,671	5,827	407	42,905
1967	32,654	7,504	229	40,387
1968	33,587	6,565	294	40,446
1969	36,926	9,035	346	46,310
1970	39,668	10,113	302	50,083

Source: Institute of Scrap Iron and Steel yearbook.

The total of domestic purchased scrap plus exports and imports is up almost 50 percent from the late 1950's and early 1960's. Domestic purchase scrap consumption alone rose about 10 million tons during the same period.

Total scrap used by iron foundries, steel mills, and for export during the year amount to 104,106,000 short tons in 1969. Of this total scrap, home scrap was estimated to account for about 59 percent, or 61,675,000 short tons. Purchased scrap accounted for the remainder, or 42,431,000 short tons. In turn, prompt industrial scrap was estimated to be the source of about 33 percent of total purchased scrap while obsolete scrap was estimated to account for the remaining 67 percent of purchased scrap. About 8 million short tons, or 28 percent of obsolete scrap, was estimated to have come from junk automobiles. Of the three sources of scrap, i.e., home, prompt, and obsolete, the latter is the one that expands and contracts most with changes in total demand.

The following table indicates consumer stocks of scrap and pig iron for 1968 and 1969. Stocks of both decreased in 1969. Other stocks of iron and steel scrap are not easily determined. The United States has 14 to 20 million junk automobiles and another 6 to 7 million are added to this stockpile each year.

Stocks of iron and steel scrap and pig iron at major consuming industries' plants December 31

Year	Manufacturers of steel ingots and castings	Manufacturers of steel castings	Iron foundries and miscellaneous users	Total
		Thousand short tons		
Scrap stocks				
1968	6,691	346	845	7,882
1969	5,413	270	869	6,552
Pig iron stocks				
1968	2,028	22	292	2,342
1969	1,467	16	240	1,723

Source: U.S. Bureau of Mines.

The direct inputs for the steelmaking furnace include ferrous scrap, iron pellets (crude metallic iron), and either hot metal or pig iron. Nonintegrated steel producers purchase scrap and pig iron for

melting in the steelmaking furnace. Integrated steel producers supply their pig iron needs by the smelting of iron ore and iron ore pellets in a blast furnace within their own complex to produce hot metal. Hot metal is much better suited to steelmaking. It is necessary to remelt pig iron, thereby converting it back to hot metal, before it can possibly be refined into steel. The contained sensible and latent heat energy in hot metal makes it a considerably more valuable commodity than pig iron, even though it is only an intermediate product in steelmaking processes. In steelmaking, the unwanted excess carbon and silicon are oxidized out of hot metal, along with some of the iron (inevitably) and the other dissolved elements such as manganese, sulfur, and phosphorus. Inasmuch as these oxidizing reactions yield heat, which has engergy value, the yield heat is absorbed in the melting of scrap iron.

Two principal processes, which are very similar chemically, are used in the United States to convert hot metal into steel. The dominant process, basic oxygen steelmaking, is based entirely upon the heat of refining as its sole energy source; the other, open hearth steelmaking, will accept energy obtained from external fuels. There are distinct technological limits to the amount of ferrous scrap and blast furnace hot metal that can be used in steelmaking; scrap and hot metal (or melted pig iron) are interchangeable in steelmaking only in given situations. There are three important types of steelmaking furnaces used today: the electric arc furnace which uses essentially nothing but scrap, the basic oxygen furnace which uses a little as 15 percent or as much as 30 percent scrap as its source of iron, and the open hearth furnace which typically uses about 45 percent scrap, but can use all scrap.

The basic oxygen process of steelmaking has grown rapidly, at an average annual rate of 283 percent, from an output of 1,864,000 short tons in 1959 to 63,330,000 short tons in 1970. The basic oxygen furnace converts hot metal (molten pig iron) into steel. The process uses smaller amounts of scrap than the electric furnace and the open hearth furnace. Based on refining ordinary hot metal with pure oxygen, the fuel content of hot metal is sufficient to heat and melt about one-third of its weight in steel scrap. Thus, the proportion of hot metal in the basic oxygen furnace charge is typically from 69 to 75 percent, normally 71 percent in efficient installations. Since most steel mills using this process generate their own home scrap, they need to purchase little scrap in the market. However, some companies have increased their ability to use more

scrap in the basic oxygen furnace by preheating before charging into the vessel.

Output from open hearth furnaces has declined from 80,327,000 short tons in 1954 to 48,022,000 short tons in 1970. Until recently, such furnaces were the largest source of steel, but in the last 2 or 3 years the basic oxygen furnace has become more important. While the basic oxygen steelmaking is dominant for all new or replacement capacity, the older open hearths are being retired only slowly. An important reason is that the use of fuel, supplied by burner systems, for some of the energy gives the open hearth process a capacity for using a higher and more freely variable proportion of scrap. Indeed, the open hearth furnace can use as little as 29 percent scrap or as much as 100 percent. Thus, in a favorable scrap market, it is possible for a modern open hearth furnace operation to produce steel more cheaply than a basic oxygen furnace. However, operating and capital costs are high and throughput times are long. Typically, the open hearth furnace, as operated by the integrated steel companies, has used a charge that contains slightly less than 50 percent scrap. The replacement of the open hearth by the basic oxygen process has resulted primarily in lower domestic demand for scrap and in increasing availability of scrap for export. The increased availability of scrap has to some extent contributed to the growth of electric arc furnaces.

Steel output by electric furnaces has increased from 5,436,000 short tons in 1954 to 20,162,000 short tons in 1970. The average annual rate of increase in electric furnace steel output during this period has been 24.5 percent. The electric arc furnace is expected to account for an increasing percentage of raw steel produced. This furnace can use a 100-percent scrap charge, but for technological reasons usually uses about a 98-percent scrap charge, including some pig iron. About 30 percent of the scrap is home scrap, and the remainder is purchased.

Steel production and scrap consumption by type of furnace

	1970 steel production	Percent of steel produced			Percent of purchased scrap
		1960	1970	1985	used in charge
	Tons			*Estimate*	
Electric arc	20,162,000	8	15	30	98-100
Basic oxygen	63,330,000	3	45	60	15-30
Open hearth	48,022,000	90	40	10	29-100

In the long range future, it is expected that the open hearth process will disappear owing to its high capital cost per unit of productivity. In that event, the field will be dominated by electric arc steelmaking and basic oxygen steelmaking. As stated, the basic oxygen process uses a small fixed proportion of scrap, and that proportion corresponds quite closely to the amount of home scrap produced within the mill. The electric arc process is entirely independent of hot metal, and most of its net production today is based upon purchased scrap. Thus, for the future, the two dominant steelmaking processes are conceptual opposites. Where basic oxygen steelmaking is used, little or none of the iron contained in steel leaving the plant will have entered the plant as purchased scrap. In a plant based upon electric arc steelmaking, it is likely that all of the iron in steel leaving the plant will have entered the plant as purchased scrap iron.

The Institute of Scrap Iron and Steel offered expert metallurgical testimony prepared by Battelle Memorial Institute, Columbus Laboratories, to demonstrate competition between iron ore and ferrous scrap and the existence of a rate disadvantage on scrap resulting from the present rate structures. Battelle submits that in the making of steel, whether by use of iron ore or scrap iron as the primary raw material, the steelmaker is concerned with iron units in the respective inputs. The alleged competition, in essence, is based on the relative iron content which can be reduced to forms suitable for steelmaking. Thus, it concludes that freight rates on iron ore and ferrous scrap should reflect the respective available iron contents in the products.

Battelle acknowledges that since iron units in ore are oxidized and, therefore, not identical to the metallic iron units in scrap, it is necessary to consider the chemical reducing agent required to convert the iron in ore to metallic form, and thus to make the iron units in the competing products directly comparable. The appropriate reducing agent is metallurgical coal or coke, which may be distinguished in function from the coal used to melt the reduced iron to form hot metal. Thus, the equivalence formula developed by Battelle to describe the metallurgical relationship between competitive iron units in an average ore and average scrap iron is as follows:

2,000 pounds of scrap (95 percent Fe) =
3,167 pounds of iron ore (60 percent Fe)+602
pounds of coal.

In Ex Parte No. 265 and Ex Parte No. 267 we adopted the formula, as calculated by respondents, that production of 1 ton of pig iron, which would compete with 1 ton of scrap, requires 1.8 tons of iron ore (about 3,600 pounds), 0.73 tons of coke (1,460 pounds), 0.22 tons of limestone, and 0.056 tons of scrap. We concluded that while the basic rates per ton on iron ore are lower than on scrap, the total transportation charges on the commodities required to produce 1 ton of pig iron are substantially higher. Battelle considered the additional components of steelmaking employing both primary sources of metallics and concluded the impact on finished steel of transport cost for refractories, fluxes other than limestone, minor supplies, capital, labor, and utilities other than energy are identical in both types of steelmaking. In the matter of limestone, Battelle concedes the possibility that a slight transport-based differential would show higher costs for ore-based steelmaking. However, since limestone also moves by truck, and not entirely by rail, Battelle feels that element of the equation represented by the cost of transporting limestone may be ignored. We do not find this logic convincing. However, Battelle also shows a transport-based differential exists in the matter of energy coal (not reducing coal) used in scrap-based steelmaking. Thus, it concludes it is proper and technically sound to assert that the offsetting transport-based biases on limestone and energy (coal) exist in approximately similar magnitudes, with the resulting overall conclusion that all transport cost factors but those for ore, metallurgical coal (for reduction), and scrap iron approximately offset each other in the competing steelmaking processes.

According to protestant, the Battelle formula presents a fair basis for relating the competition between ore and scrap as metallic sources. Thus, iron and steel scrap and iron ore are competitors in the sense that they both yield iron units usable at a profit in the steelmaking process. The main difference between the competitive inputs is that iron ore requires reduction from oxide to metallic form prior to use; the reduction of iron ores confers equivalence with the iron found in ferrous scrap.

Battelle reduced the metallurgical formula to an equivalence reflecting the estimated share of rail movement of the various commodities: thus, 74 percent of the scrap iron and steel consumed moves by rail, 58 percent of iron ore, and 65 percent of

metallurgical coal. Again, we are not persuaded that this distinction is necessary or proper. Battelle utilized the 1-percent waybill statistics for 1966 to determine average revenue per hundredweight for each commodity: 20.6 cents for scrap, 8.2 cents for iron ore, and 14.2 cents for coal. When these revenue data are inserted into the adjusted equivalence formula, the rate equivalence fails by the amount of $1.49 per ton. Thus, Battelle concludes the rate structure is, on the average, prejudicial against the movement of iron and steel scrap, or prefers the movement of iron ore, by $1.49 per ton. On the basis of this $1.49 rate disadvantage for scrap at the 1966 level, Battelle concluded that the excess cost per net ton of raw steel made from purchased scrap is $4.21. In terms of relative importance, it is generally estimated that the cost to manufacture a net ton of raw steel is approximately $69 to $74 per ton of ingot. Thus, on this basis, the impact of the railroad rate differentiation amounts to approximately 6 percent of total costs.

In rebuttal, respondents apply the basic Battelle formula to demonstrate that the proposed percentage increases actually favor scrap iron in relation to hot metal in terms of total transportation costs. As stated, the Battelle formula equates 2,000 pounds of ferrous scrap with 3,167 pounds of iron ore plus 602 pounds of coal. The latter are stated as the components required to produce 1 ton of hot metal, or molten pig iron. The application of the proposed 4-percent increase to 2,000 pounds (1 net ton) of scrap iron would mean an increase of 20.92 cents. The 4-percent increases applied to 3,167 pounds of iron ore (average rate $3.29 per gross ton) and 602 pounds of coal (average rate $3.45 per net ton) totals 22.8 cents.

Effect of Percentage Increase on Scrap Iron and Components of Hot Metal

2,000 pounds of scrap iron - Average rate $5.86 gross ton
Average rate $5.23 net ton
$5.23 net ton x 1 ton = $5.23

3,167 pounds of iron ore - Average rate $3.29 gross ton
(1.5835 net tons) Average rate $2.94 net ton
$2.94 net ton x 1.5835 net tons = $4.655

Effect of percentage increase on scrap iron and components of hot metal—Continued

602 pounds of metallurgical coal - Average rate $3.45 net ton
(0.301 net tons)
$3.45 x 0.301 = $1.04

Equivalents

Scrap iron	Iron ore 3,167 pounds
2,000 pounds	Metallurgical coal 602 pounds
	$4.66 iron ore
	1.04 met. coal
$5.23	$5.70
0.04	0.04
Effect 20.92 cents	22.80 cents

In ores, the iron content is limited by nature to a maximum of 73 percent and the improvement of iron content above that level yields an artificial product. Many ores, however, are found naturally with far lower iron content such that agglomerating or beneficiating processes are common even where the end result is a product with less than 73-percent iron content. Thus, a low-grade ore improved by any one of many possible processes to a level of 60-percent or 65-percent iron is still iron ore although most likely in pellet form (iron ore pellets), whereas an ore improved by prereduction, whether by blast furnace smelting or otherwise, to a level of 90 to 95 percent iron is no longer considered an ore but rather an ore product, generally referred to as crude metallic iron or iron pellets. Iron ore and iron ore pellets serve exclusively as inputs for the blast furnace and, when processed in conjunction with coke and limestone, will produce hot metal or pig iron. The only commodities sufficiently pure in iron content to serve as direct inputs for steelmaking furnaces are ferrous scrap, crude metallic iron or iron pellets, and pig iron or hot metal.

Thus, the only transportable commodities which are directly competitive with ferrous scrap as inputs for steelmaking furnaces are pig iron and crude metallic iron or iron pellets. Respondents have proposed identical increases on these commodities. On the basis of the detailed evidence contained in this record, and, in particular, in view of the requisite intervening reduction and smelting processes, including the transportation and application of substantial quantities of coke as a reducing agent and limestone as a fluxing agent, shown

necessary to transform iron ore to a competing product, we are compelled to affirm our finding in Ex Parte No. 265 and Ex Parte No. 267 that ferrous scrap and iron ore do not specifically and directly compete to the extent that they require similar rate treatment.

Respondents note that important differences exist in the transportation service performed by the railroads in connection with shipments of ferrous scrap and iron ore, including differences which bear on the relative costs of moving these commodities such as average weight per car, average length of haul, number of carloads per shipment, and regularity of movement. Respondents developed comparisons of such factors for iron and steel scrap and iron ore from Statement TD-1, Caroload Waybill Statistics—1969. In each instance the transportation characteristics of iron ore are superior. Thus the average weight per car from iron ore within official territory is shown to be 77.5 tons compared to only 55.5 tons for ferrous scrap. Similarly, the average length of haul for iron ore within official territory is 188 miles, compared to only 106 miles for ferrous scrap. Typically, iron ore is handled in large volumes and frequently in trainload quantities of 100 or more cars; iron or steel scrap, which may be originated or terminated in multiple-car cuts, is frequently moved at the rate of a single car per day. The waybill data for these two commodities follow:

	Sample size (waybills)	Carloads	Carloads per waybill
		Iron or steel scrap	
U.S. to U.S.	994	5,270	5.3
Official territory	712	3,625	5.1
		Iron ore	
U.S. to U.S.	266	19,150	72.0
Official territory	86	4,550	53.0

Respondents further contend that a comparison of the freight rates should take into consideration the costs involved in transportation of iron ore prior to the rail move. For example, no account is taken by protestant of the costs of the water movement which precedes the rail movement from Lake Erie to North Atlantic ports to the Pittsburgh district.

In regard to the maximum of 22 cents per gross ton proposed on iron ore, respondents note the present average rate on scrap iron

and steel within the East (excluding the 2.5-percent surcharge) is $5.86 per gross ton. A 4-percent increase means an average increase of 23.44 cents per gross ton on scrap iron. A 22-cent holddown on scrap would, therefore, affect the anticipated revenues on all scrap iron moving at the average rate or above. On the other hand, the average rate on iron ore within official territory is $3.29 per gross ton and a 22 cents per gross ton maximum is of little consequence since the average increase on iron ore will be only 13.16 cents per gross ton.

Respondents estimate the proposed maximum will apply to less than 5 percent of the total iron ore terminations (51.9 million tons in 1970) in the East. The maximum would not come into play until the iron ore rate reaches $5.62 per gross ton, the level at which 4 percent begins to exceed 22 cents. The great preponderance of iron ore movements in the East are ex-lake volume shipments to the furnace points in the Pittsburgh, Youngstown, Wheeling, and Portsmouth area. These rates generally range from $2.60 per gross ton to $3.93 per gross ton. Rates on significant movements of import ore through Philadelphia, Pa., Baltimore, Md., and Fairless, Pa., to consuming points in eastern territory generally range at levels substantially below $5.62 per gross ton and the 22 cents maximum would not apply. While there are some single-car rates on North Atlantic import and ex-lake iron ore in excess of $5.62 per gross ton they have no significant competitive impact and move relatively little tonnage.

Generally, therefore, the 22 cents maximum permits the full 4-percent increase to apply on iron ore traffic except the relatively small amount of long-haul all-rail movements. As a matter of fact, the only significant movements which would be affected within the East are the movements from Benson Mines, N.Y., and from eastern Canada to the Pittsburgh area. The rates from New York origins range from $6.05 to $6.26 per gross ton at the Ex Parte No. 267 level. Rates from Canadian origins range from $6.91 to $8.64 per gross ton. On this traffic, the 22 cents per gross ton holddown will apply and reduce the increase below 4 percent. From some major Canadian origins the increase will be no more than the presently effective 2.5-percent surcharge. For example, from Dane, Ontario, to Pittsburgh the $8.64 per gross ton rate will be increased by 2.5 percent to $8.86 per gross ton.

As stated, we are convinced that the only transportable commodities which are directly competitive with ferrous scrap as inputs for steelmaking furnaces ore pig iron and crude metallic iron

or iron pellets; and we find warranted the identical increases proposed on these commodities.

We see no justification for requiring that increases on ferrous scrap be made subject to the maximum per ton limitation applicable on iron ore. Ferrous scrap, as found above, does not directly compete with iron ore in the steelmaking process and their transportation characteristics—including differences in average weight, length of haul, size of shipment, regularity of movement, and general distribution—are materially different.

Finally, we conclude that the level of prices for ferrous scrap rises and falls with steel production, with no discernible relationship to freight rates and freight rate increases, and that the increase authorized herein will not inhibit the movement of ferrous refuse, such as abandoned automobiles and refrigerators. Accordingly, we foresee no adverse effect on the quality of the human environment resulting from our approval. For the same reason, we believe that a limitation on the increase for purposes of encouraging increased movement of ferrous scrap would be unsuccessful and would serve only to deprive the railroads of needed additional revenue. The situation here differs materially from that found to exist with respect to secondary materials generally. See discussion above.

* * * * *

Fly ash.—The increase proposed on fly ash is 6 percent. Fly ash is an extremely low value waste byproduct which results from the combustion of coal. It becomes commercially available because it is collected by electric utilities to prevent air pollution. Less than 10 percent of the fly ash collected is disposed of commerically. Protestant, Chicago Fly Ash Company, ships the commodity for use as a pozzolan in the contruction of concrete dams in the West.

Fly ash is shipped long distances in both rail and privately owned covered hopper cars, is competitive with natural pozzolans, consisting mainly of shale and volcanic ash, available locally throughout the West and is highly sensitive to freight rates. The average f.o.b. price on protestant's rail shipments is $1.50 per ton; rail rates on its two principal movements to western dam sites are $14.37 and $15 per ton. Application of the 6-percent increase to these rates will result in increases of 86 cents and 90 cents per ton, respectively. Protestant further contends that if it is unable to market fly ash this will create a waste disposal problem which will hamper efforts to clean up the enviroment.

Respondents assert that the low value of fly ash is recognized by the fact that the rate levels have been and will remain at a low level. They also suggest that the disposal problem must be solved by the electric utilities which produce the fly ash.

The fly ash market has been expanding at a rate of 75 percent each year between 1966 and 1970. However, utilization of fly ash in this country lags behind European utilization which runs as high as 50 percent of production. Increased utilization in this country may be largely dependent on the production of higher quality ash. For example float ash, a variety of fly ash, is lighter in weight with a more uniform particule size, coarser than regular fly ash, high in silica and aluminum content and low in iron. Because of these properties, float ash has been recognized as a good refractory raw material and sells in one European country for $80 per ton.

The proposed increases on fly ash would amount in some instances to 60 percent of the f.o.b. price. In previous general increase proceedings, we have accorded some relief to fly ash shippers. While we agree with respondents' contentions that they should not be obliged to shoulder the responsibility for the production and disposal of this waste product, and that fly ash should bear a proportionate share of respondents revenue needs, we, nevertheless, believe that the proposed increases are excessive

in light of the record herein, including environmental considerations. Accordingly, we find that the proposed increases will not be just and reasonable to the extent that they exceed 3 percent. That limitation, we believe, will encourage increased movement of fly ash by rail.

* * * * *

Petroleum refinery wastes and waste sulfide.—On chemical or petroleum waste, respondents propose an increase of 4 percent generally, and 3 percent to or within the South. On caustic soda waste, spent caustic soda, and spent caustic soda solution, the proposed increase is 3 percent.

The Merichem Company, which opposes the increases, purchases petroleum refinery wastes from refineries located throughout the United States and Canada. It ships these wastes to Houston, Tex., for recovery of small amounts of usable chemicals, including waste sulfide, cresylic acids, and phenol. The recoverable content of petroleum refinery wastes is less than 17 percent of gross weight. After removing the toxic pollutants, the residue is disposed of in a manner consistent with pollution control standards. Prior to Merichem's operations, refinery wastes were disposed of by dumping in the ocean and deep land wells resulting in a serious pollution of surface and subsurface waters. Merichem does not oppose an increase on cresylic acids and phenol, but does oppose the imposition of any increase on inbound petroleum refinery wastes and outbound waste sulfide solution.

Protestant contends that these low-valued waste commodities cannot sustain the proposed increases, that the increases will cause further diversion to barge movements, and that they are not in the public interest since they will result in a curtailment of its waste recycling service. To transport these waste materials, Merichem operates a fleet of 258 leased tank cars and 5 leased tank barges with a combined capacity of 7,900 tons. Its largest operating expense, transportation, represents over 30 percent of its total costs. Present freight charges on petroleum waste exceed its value. If the increases are granted, Merichem proposes to divert traffic to barge where possible and to discontinue certain movements from landlocked refineries. Allegedly, as a result of increases granted in Ex Parte Nos.

265 and 267, Merichem began two new barge movements and abandoned movements from 11 refineries.

Protestant continues to receive wastes from over 100 refineries in 21 States and Canada. It recently supported the establishment of a rate of 80 cents per hundredweight from Amoco, Va., to Houston, a distance of 1,431 miles. In contrast, the present rate from American Oil's refinery at Sugar Creek, Mo., a representative midwestern movement, is only 48 cents per hundredweight. Since it imports wastes for long distances from Canada, Pennsylvania, or Virginia, there may be other reasons than freight rates for not serving other plants within that radius. For example, the amount of useful chemicals in any particular batch of petroleum wastes depends on the type of crude processed by the refinery, the processes and the chemicals employed. Thus, the use of wastes of a particular refinery may largely depend on the amount of recoverable products in the waste and the selling price of such recoverable products. It is also apparent that if Merichem pays the freight and utilizes leased tank cars it is to its advantage to obtain petroleum wastes as close to Houston as possible where the freight and tank car turnaround times will be minimized. Moreover, the allegation that the increases will result in a diversion from rail to barge is contradicted by protestant's admitted increase in the use of rail service from 1969 through 1971. Finally, when barges are available some traffic may be diverted regardless of the railroad rate level.

Protestant's contentions that refineries depending on rail movement may again resort to dumping wastes into watersheds is open to question. Refinery operators are cognizant of the need to control pollution. Moreover, there are a number of alternatives available to refiners, including direct sale to papermills or to Merichem's competitors, and use of fluid bed incineration, a nonpolluting method of waste disposal. Additionally, in the fluid catalytic cracking process the spent caustic waste solution may be stripped of hydrogen sulfide. Furthermore, petroleum products may be treated so as to remove the sulphur directly rather than through caustic washing. The sulphur so recovered is in a salable form and there is no creation of caustic petroleum refinery waste. The trend in the industry is toward this type of process.

In Ex Parte No. 267, we limited the proposed increases on petroleum waste products to 8 percent giving due consideration to environmental matters. In proposing the increases under consideration, respondents appear to have taken into account the transportation characteristics of these commodities, the necessity for

establishing the increases at a level which would facilitate the movement of this traffic while providing some measure of contribution to their overall revenue needs and the competitive situation, including possible diversion of the traffic to barge movements especially to or within the South. Accordingly, we find that the proposed increases will be just and reasonable and otherwise lawful.

* * * * *

ULTIMATE CONCLUSIONS AND FINDINGS

Exceptions and requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

Upon consideration of the entire record in these proceedings, we conclude and find:

1. That respondents are in need of additional revenue from their interstate freight rates and charges to offset recently incurred increased operating costs and to provide an improved level of earnings. The public interest and that of the national defense, in a sound, adequate, and efficient transportation system will be adversely affected unless the increased interstate freight rates and charges proposed by respondents in this proceeding, subject to the limitations and exceptions set forth below, are permitted to be put into effect;

2. That in absence of the additional revenue to be derived from the increased freight rates and charges authorized herein, the earnings of respondents would be insufficient to enable them under honest, economical, and efficient management to provide adequate and efficient railway transportation services consistent with the public interest and the national transportation policy;

3. That the surcharge tariff No. X-281, as amended, was just, reasonable, and otherwise lawful during the limited period of its applicability;

4. That under the selective increase tariff No. X-281-A freight rates and charges may be increased except as noted in this report. For convenience, the principal exceptions are as follows:

(1) Intraterritorial traffic within the East—not more than 6 percent.
(2) Intraterritorial traffic within the South—not more than 4 percent.

(3) Intraterritorial traffic within the West—not more than 5 percent.

(4) Interterritorial traffic from and to all territories—not more than 6 percent.

(5) Lighterage service at New York Harbor—no increase.

(6) Mechanical protective service and detention charges for cars used therewith—no increase.

(7) Secondary materials (specified) not to exceed 3 percent.

(8) Copper bars and billets, rough cast—not to exceed 3 percent within the East.

(9) Bituminous coal—not to exceed 5 percent, maximum 30 cents per ton from East or South to Transcontinental Freight Bureau territory, or from West to East; and as to unit-train movements within the East and to or within the South—no more than 15 cents per ton.

(10) Petroleum and coal coke, lignite, and petroleum, coal and coke briquettes—not to exceed increases authorized on bituminous coal.

(11) Fluorocarbons—not to exceed 3 percent.

(12) Salt, in packages—no increase within the East or from the East and West to the South.

(13) Fly ash—not to exceed 3 percent.

(14) Processed fruits and vegetables—not more than 4 cents per hundredweight.

(15) Fresh fruits and vegetables, including citrus pomace, potatoes, and onions—not to exceed 4 percent, maximum 4 cents per hundredweight.

(16) Walnuts, shelled or unshelled—not to exceed 3 percent, maximum 3 cents per hundredweight.

(17) Wine—not to exceed 4 percent, maximum 4 cents per hundredweight.

(18) Sugar beets and sugar cane—not to exceed 3 percent.

(19) Beet and cane sugar, corn syrup and corn sugar—no more than 3 cents per hundredweight.

(20) Limerock and bagasse—not to exceed 4 percent.

(21) Grain and grain products—not to exceed 3 percent and, in the case of prepared flour mixes, subject to a maximum of 3 cents per hundredweight. Tariffs publishing authorized increases must observe a 1/2-cent progression.

(22) Malt liquors—not to exceed 4 percent, maximum 4 cents per hundredweight.

(23) Animal and poultry feed—not to exceed 3 percent.

(24) Fertilizer—not to exceed 3 percent but, in the case of phosphate fertilizer, no increase.

(25) Millwork—not to exceed 4 percent, maximum 4 cents per hundredweight.

(26) Woodpulp—no increase.

(27) Pulpwood and woodchips—interterritorial traffic from and to all territories—not to exceed 5 percent. Proposed minimum charges found not justified.

(28) Newsprint—not to exceed 5 percent to and within mountain Pacific territory and, on movements within Southwestern Freight Bureau territory or from that territory to the South, no increase.

(29) Chemicals and allied products—not to exceed 3 percent on acyclic organic ethers and propylene oxide.

5. That the increased freight rates and charges authorized herein will not exceed a maximum reasonable level, and the revenues derived therefrom will result in earnings and rates of return for the railways, as a whole and by major districts, not in excess of that

required to enable them to render adequate and efficient transportation at the lowest cost consistent with the furnishing of such service;

6. That the increased freight rates and charges authorized herein will have no undue adverse effect on the movement of traffic by railway or upon the environment, and are consistent with the Price Stabilization Program;

Accordingly, orders will be entered, (1) requiring the cancellation of the schedules under investigation herein found not justified without prejudice to the establishment or maintenance of schedules in conformity with the findings herein, and (2) modifying all our outstanding orders to the extent necessary to permit the maintenance of the increased freight rates and charges herein authorized, and granting relief from the provisions of section 4 of the act and our tariff publishing rules as may be necessary, including authority to publish and file tariff changes on not less than 15 days' notice as to commodities not moving in the recycling process, and not less than 35 days' notice in the case of commodities being transported for purposes of recycling.

COMMISSIONERS TUGGLE and HARDIN concur in the result.

COMMISSIONER BROWN, concurring in part:

While I am in general agreement with the majority as to the increases authorized in the report, I am of the opinion that we should not approve any of the increases requested for recyclable commodities. In reaching this conclusion, I have balanced the revenue needs of the rail carriers against the effect of such increases on the quality of the human environment. On the one hand, and with due consideration of the rail contentions respecting need for additional revenues, it is my considered opinion that denying the rail request for increases on recyclable commodities will, on the whole, have very little effect on overall rail revenues. On the other hand, the National Environmental Policy Act of 1969 (NEPA) was enacted into law by the Congress in order to meet a long-overdue need and strong public pressure for affirmative national action to improve the quality of our deteriorating environment. Further, it is evident that both the Executive and Judicial branches of our Government are vitally concerned with environmental problems. Thus the administrative agencies charged with regulatory responsibilities cannot in good conscience ignore this clear mandate for action. Consequently, I am of the opinion that in its treatment of recyclable commodities moving in interstate commerce, the

majority, while paying tribute to the environmental needs and the provisions of the NEPA fails to effectively deal with the environmental issue posed in this case. In my view, no better way can be found to deal with this issue than to deny increases on these commodities and thus remove any possible risk that further increased transportation charges may retard the movement and free flow of these articles in interstate commerce. To me this course of action appears to best serve the public interest.

COMMISSIONER DEASON, dissenting in part:

As a matter of policy, I dissent to that portion of the report which grants increases on selected recyclable materials. It is my view that, all things considered, the Commission should grant no further increases on recyclable materials at this time.



ENVIRONMENTAL IMPACT STATEMENT

EX PARTE NO. 281

INCREASED FREIGHT RATES AND CHARGES, 1972

Summary

1. The above-entitled proceeding involves an administrative action.

2. For purposes of this draft environmental impact statement, the proposed action is the possible approval or disapproval by the Interstate Commerce Commission of selected increase proposals for commodity groupings to replace the 2 1/2-percent surcharge recently allowed to become effective on a temporary basis, to be applied by the railroads in rendering service throughout the United States.

3. As an emergency interim measure to meet a critical need for additional revenue that the railroads have demonstrated, the imposition of the surcharge published to become effective on February 5, 1972, and to expire not later than June 5, 1972, as required by the order of the Interstate Commerce Commission, approved February 1, 1972, will have no significant adverse effect on the quality of the human environment within the meaning of the Environmental Policy Act of 1969.

However, by its order the Commission directed the railroads to update their tariffs to reflect rate increases previously approved not later than June 5, 1972. The railroads, on February 28, 1972, filed a proposal to increase their freight charges on a selective basis. While the Commission has made it quite clear that the surcharge now in effect will expire by operation of law no later than June 5, 1972, and thus cannot actually become a permanent part of the railroads' rate structure, nevertheless, for the purpose of analyzing its impact upon environment, and for that purpose only, we shall treat it arguendo as though it were not an interim, but a permanent increase. Under the assumed condition, if the Commission were to approve the railroads' actions by report and order entered at the conclusion of an investigation herein, such action would have only limited, if any, impact upon the environment, as more fully set forth in the accompanying draft environmental impact statement.

4. The alternatives to the incorporation of the surcharge as a permanent part of the railroads' rate structure include the selective application of authorized increases, to individual rates, the imposition of so-called holddowns or the disallowance altogether of any rate increase not previously approved by the Commission.

5. This draft environmental impact statement will be served upon all parties of record herein and upon those additional persons identified in the order of Chairman Stafford approving its service, all of whom are requested to offer comments.

6. This draft environmental impact statement will be served on March 6, 1972.

The Interstate Commerce Commission has permitted the Nation's railroads, effective February 5, 1972, to impose a 2 1/2-percent surcharge on existing rates (with specified exceptions and conditions) for an interim period no longer than 4 months, ending June 5, 1972. On February 28, 1972, the railroads submitted a proposal to increase their rates selectively, and sought permission to file updated tariffs seeking a "general increase in freight charges on a selective basis." The active investigation was held in abeyance until receipt of a request by the carrier respondents for permission to file the revised tariffs indicated above. Upon consideration of the evidence and statements presented to date in Ex Parte No. 281, *Increased Freight Rates and*

Charges, 1972, 340 I.C.C. 358, the following proposed draft environmental impact statement is made, in compliance with section 102(2)(C) of the National Environmental Policy Act (NEPA), concerning the possible impact on the environment of the Commission's approval by report and order at the conclusion of its investigation of the incorporation of the surcharge (or the rail substitute therefor) into the schedules of freight rates and charges expected to be filed by the railroads on or before June 5, 1972. This statement is made primarily to point out the issues, and to assist the parties, as well as governmental agencies concerned to present evidence and arguments in the on-going investigation proceeding and otherwise to elicit their comments.

The service of this statement in no way concedes the applicability of NEPA requirements at the suspension stage, that is, when the Commission decides whether to suspend and/or investigate a rate filing (which is all so far done in Ex Parte No. 281), or when rate changes occur by operation of law without suspension or investigation. *Port of New York Authority* v. *United States*, F. 2d , Dockets 71-1769 and 71-1770 (2d Cir. Nov. 9, 1971).

1. *The environmental impact of the proposed action.*—The imposition of, or failure to impose, a surcharge of 2.5 percent as a permanent part of the railroad rates applicable on freight services might have some impact on the environment; however, based on the varying predictions of the parties in their statements filed to date, it is unclear what the effect would be. Thus, Chairman Russell E. Train of the Council on Environmental Quality (CEQ) has stated to the Chairman of this Commission that across-the-board percentage increases widen alleged price biases against secondary materials and that they raise the costs of doing business which allegedly can hinder the salvage and reclamation industry. In their joint protest to the proposed surcharge the Students Challenging Regulatory Agency Procedures (SCRAP), The Environmental Defense Fund, the National Parks and Conservation Association, and The Izaak Walton League of America contended that any across-the-board increase in freight rates of recyclable materials would have adverse effects on the movement of such environmentally desirable traffic.

On the other hand, an environmental statement (V.S. No. 37) submitted by the railroad respondents as a result of the Commission's requirement (340 I.C.C. at 362) maintains that the surcharge can have no adverse effect upon the environment, and that any environmental impact will come only as the result of a deterioration in railroad service due to lack of funds if the surcharge had not been permitted to go into effect.

It is impossible at this point in the investigation to assess with any certainty the environmental impact of assessment of, or failure to assess, a surcharge on various recyclable materials. The parties are called upon to submit additional factual data with regard to this issue.

2. *Any adverse environmental effects which cannot be avoided should the proposal be implemented.*—Since the surcharge, if a part of the permanent rail rate structure, might have some adverse effect on the movement of the recyclable materials, the effect of implementing the surcharge could possibly be to discourage the movement of such traffic. For example, the statement of the National Association of Secondary Material Industries, Inc. (V.S. No. 98), states that the price of mixed paper stock was $11 per ton in 1966 but declined to $7.50 per ton in 1971, and that, except in the southern territory, rail rates for movements of 150 miles or more were 37-plus cents per hundred pounds of waste paper ($7.40 per short ton).

To look at another commodity as an example, based on the available information, the value of the scrap iron and steel increased by about 60 percent between 1967-70, and the price fluctuation for that commodity in a single month was more than $4 per ton. It would seem that the profits of scrap iron dealers are much more influenced by prospective price changes than the incremental freight rate of 2.5 percent which averages out at an increase of about 12 cents per ton.

We note that none of the parties undertook the task, in statements filed thus far, of estimating comparatively the specific effect of the surcharge on the demands for recyclable materials and the commodities with which they compete. The parties should address themselves to the question of whether the demand for scrap iron or waste paper and textiles would be substantially affected by an increase in price of about 12 cents per ton, taking into consideration the percentage increases that would be applied to competitive commodities.

3. *Alternatives to the proposed action.*—The railroad industry's need for additional revenues is well known. The alternatives to the proposed action thus appear to lie in a subsidy for the salvage and reclamination industry or a holddown on rate increases for recyclable materials. The other alternative, denial of any increases, could lead to a disruption in rail service, especially in connection with those carriers which are in financial difficulties. A subsidy, to be paid by interested communities or perhaps collected from the primary materials producers in the form of a tax, is beyond the jurisdiction of this Commission. Accordingly, only a partial or full holddown in the rate increase for recyclable materials can be considered in this or any similar proceeding, unless firm commitment for such subsidy is made part of the record. It should also be pointed out that we do not know whether the railroads intend to permanently increase the charges on secondary materials.

A "holddown" is the granting of something less than the proposed rate increase. This Commission in the past has used the device of a holddown to achieve a desirable result. See, *e.g.*, Ex Parte Nos. 265 and 267, *Increased Freight Rates, 1970 and 1971*, 339 I.C.C. 125, 209 (1971). The use of such a device, however, is not free from objections.

First, the primary mandate of this Commission is the maintaining of an efficient and economical transportation system for the commerce of the Nation. The railroads have argued that the NEPA does not require the carriers to subsidize the recycling of secondary materials, and that markedly depressed rates on some commodities thrust a subsidy burden on other traffic. Yet it seems that NEPA consititutes sufficient authority for particular inquiry into the transportation of waste materials for recycling or reuse. See, Ex Parte No. MC-85, *Transportation of "Waste" Products for Reuse*, 114 M.C.C. 92, 93 (1971), wherein the Commission declared its intention to take positive and concrete action to support and encourage antipollution programs. Nevertheless, the low rate of return and working capital level of the railroads are well known and, in order to warrant special treatment for a recyclable material, the Commission must be given facts showing substantially the entire economic picture of the salvage and reclamation industry concerned. Unduly depressed rates might well be counterproductive by burdening existing traffic, including certain volume traffic, in recyclable materials now moving with relative ease under established commercial relations.

Secondly, the dichotomy between rates based on cost of service and those based on other considerations has been well recognized. A "holddown" is not ordinarily justifiable under cost-of-service theory of ratemaking and so must be classed under a different approach. The Commission has been severely criticized in the past by many

for using rate bases other than cost of service, as being discriminatory. Although it will continue to grant holddowns where justified by the facts, and where costs of the movement are met, it is up to the parties to submit concrete data to show that such treatment is warranted. The showing may include, for example, the costs of various grades of recyclable materials to dealers; their transportation costs to points of consumption; the market value of such materials at points of consumption; the rate of return for the reclaiming and salvage industries seeking holddowns; and information concerning the relationship of volume movement of such recyclable materials to the total volume of all freight moved by rail and comparison of rail revenues (both before and after imposition of the surcharge) from recyclable materials to total rail revenues, et cetera.

The Commission will take the initiative in giving consideration to environmental values in the proceeding but it must base its decision on facts. The evidence of record at the present time is wholly insufficient to support a holddown for scrap iron and steel. As metioned above, it taxes credulity to believe that the movement of an item may be greatly impeded by an increase in freight rate of 12 cents per ton when the specualtive price rise of that item may be as much as $4.25 per ton in a single month, and over a 3-year period the value of that item has risen about $16 per ton. Perhaps the parties can suggest a proper perspective for viewing the need for a holddown concerning the scrap iron and steel industry. It does not appear to be too much to ask in a proceeding of this magnitude that such be done.

4. *The relationship between local short-term use of man's environment and enhancement of long-term productivity.*—The short-term use of man's environment involved in this proceeding appears twofold. First, to the extent waste materials are recycled, they take the place of primary raw materials in satisfying consumer demand. For example, 1 ton of reprocessed waste paper conserves 17 trees. Ex Parte Nos. 265 and 267, *supra*, 339 I.C.C. at 204. Secondly, the consumption of the waste materials is a means of disposal and prevents littering and pollution. The long-term productivity of our land and other natural resources would be clearly enhanced by recycling and reusing such waste materials.

5. *Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.*—At this point, no irreversible and irretrievable commitments of resource here appear to be involved.

SUMMARY

The surcharge, if it were designed to be incorporated into the permanent rate structure of the railroad respondents, might then have an impact on the environment because it could be a deterrent to the transportation of certain waste materials for recycling and reuse. However, present evidence of record is completely inadequate for the Commission to make a determination as to what commodities, if any, warrant special treatment. The Commission requests the parties and other interested persons to assist it in properly discharging its duties under the NEPA by furnishing useful economic data on which the environmental decision in this proceeding must be based and otherwise to comment on this statement.

The opinions and conclusions set forth in this impact statement are tentative and based only on that evidence already available. It is recognized that more evidence is needed before the environmental impact can be definitively measured.

This impact statement will accompany the case through the administrative process, including the processing of the selective increase proposal filed February 28, 1972, and is subject to total or partial revision depending on the conclusions ultimately reached by the Commission.

APPENDIX D

Summary of facts and issues relating to the environmental effects of the proposed increases

I. STATEMENTS RELATING TO THE SURCHARGE

Initial statements relating to the environmental questions embraced in the temporary 2.5-percent surcharge which became effective on February 5, 1972, were filed separately by the petitioning railroads, the Institute of Scrap Iron & Steel, Inc., S.C.R.A.P., and the National Association of Secondary Material Industries, Inc., and jointly by S.C.R.A.P., the Environmental Defense Fund, the National Parks and Conservation Association, and the Isaac Walton League of America. The railroads submitted reply statements as to these issues. The positions thus taken by the parties will be reviewed and analyzed at this stage of our report in order that we might accord more complete and final explication to the admittedly provisional environmental conclusions earlier expressed in the draft environmental impact statement issued in the proceeding on March 1, 1972, and to afford a more logical base upon which to proceed to a consideration of the selective increases now proposed.

A. INITIAL STATEMENTS

The railroads.—In their statement filed January 3, 1972, the railroad petitioners represent that there will be no adverse effect upon the environment by a grant of the proposed rate increases; that there is no practical alternative to the proposed action; and that any environmental impact will come only as a result of deterioration in rail service due to a lack of needed funds, if the proposed 2.5-percent surcharge is not allowed to become effective. They believe that any possible adverse environmental impact in the form of reduced movements of commodities by rail will ensue only if the railroads fail to provide adequate and efficient service. They are concerned with environmental problems, but aver that the problem of efficient rail service is at least as pressing.

The railroads forecast that certain shippers will contend that an overall percentage increase in rail freight rates will adversely affect the movement of their commodities, and that this in turn will impede the recycling of their materials. In anticipation of arguments of the scrap iron industry (a) that any increases in scrap iron rates must be held down to those applied on iron ore, and (b) that the failure to do so will adversely affect scrap iron in the marketplace, the railroads contend that there is no connection between scrap prices and iron ore prices nor between scrap prices and freight rate levels. They point out that in Ex Parte No. 256, the scrap iron industry had complained that the low price of scrap and the allegedly high rail rates were contributing to the marginal profits of the industry; and that in Ex Parte No. 259, it was alleged that higher rates on scrap iron would dry up the movement. The railroads aver that since Ex Parte No. 259, and despite successive increases in railroad rates, the price of scrap iron prices rose from $27.64 a ton in 1967 to $43.50 a ton in 1970, without any comparable price change in iron ore and pig iron. They conclude that the use and price of scrap iron are wholly unaffected by the current proposal. Referring to this Commission's finding in Ex Parte No. 267, that an increase of 15 percent would

increase the average scrap iron rate by 76 cents a ton, the railroads argue that, on the same basis, the 2.5-percent surcharge would mean an increase of about 14 cents per ton on a commodity the price of which can regularly fluctuate by more than $4 a month.

The railroads maintain that they have already made a substantial contribution to the cause of ecology in the form of the holddowns prescribed by this Commission in Ex Parte No. 267 as to scrap iron, fly ash, petroleum wastes, nonferrous scrap, and textile and paper scrap. These holddowns, they point out, were expressly prescribed as a matter of judgment based on environmental considerations. The railroads note that the total volume of waste and scrap materials increased by 57,553 carloads between 1968 and 1969. They state that when the rail movements of these commodities increase over a period of years in the face of successive freight rate increases, it is obvious that the freight rate level has little to do with whether or not the commodity moves by rail or moves at all.

Institute of Scrap Iron & Steel, Inc.—The Institute asserts that the railroads have shown contempt for the quality of our human environment, which contempt should not be permitted to continue; and that this Commission should order the holddown on iron and steel scrap required by commercial necessity and, as a consequence, the future ecology of this Nation. It maintains that scrap iron and iron ore are competitive and that the introduction of a single percentage surcharge on the basic rates, which discriminate against the movement of scrap iron, is to continue the history of ever-rising rate prejudice. It contends that experts have shown that air pollution is lower with scrap-based steelmaking; and that the removal of unsightly scrap metal not only removes that source of land pollution but also preserves our limited natural resources, namely, the virgin metallics. The Institute avers that no increase should be permitted on iron and steel scrap until the environmental consequences of such action have been fully developed.

In a supplemental statement, the Institute questions the qualifications of the witnesses for the railroads. It states that none of these witnesses is a metallurgist or ecologist; and that such witnesses are, therefore, not qualified to testify as to the environmental effects of the proposed freight rate increase. It also avers that the statement of the railroads does not comply with the requirements of the NEPA in the matter of environmental impact.

The Institute contends that the relative prices of scrap iron and iron ore (which it deems to be competitive metallics) at any given instance are of significance to the steelmaker and that these prices incorporate the costs of service; and that any artificial distortion in the cost factors at any price level resulting from such factors as discriminatory freight rates, is incorporated into the final buying decision by the steel mill. The Institute submits that whether the price of scrap iron is $18 a ton or $48 a ton, that commodity scrap iron is at a disadvantage to iron ore, so long as provable discrimination is found to exist in the basic rates. The Institute also contends that the carriers will not lose any money as a result of holddowns because they do not now enjoy the traffic at issue.

Students Challenging Regulatory Agency Procedures (S.C.R.A.P.).—S.C.R.A.P. is an unincorporated association formed for the primary purpose of investigating the transportation freight rate structure of the railroads of the United States and its impact upon the Nation's environment, with a view to enhancing for its members, and for all citizens, the quality of the environment through a change in the said freight rate

structure. S.C.R.A.P. contends that no surcharge request should be entertained by this Commission until the railroads have updated their present tariffs to the point of eliminating needless public confusion and that no surcharge request should be granted on only 5 days' notice to the public. It asserts that to approve an interim freight surcharge prior to a hearing on the merits of the application would violate constitutional due process and preclude S.C.R.A.P. from properly advocating its environmental interest; that it (S.C.R.A.P.) must be afforded an opportunity to be heard by this Commission and by the courts before any irrevocable disposition of its interest is effected; and that any refund provision which may be embraced in an order of this Commission approving a temporary surcharge will not protect S.C.R.A,P.'s interest in preventing irrevocable harm to the environment.

S.C.R.A.P. takes the position that this Commission should not grant any interim rail freight surcharge until the environmental impact of such an action is adequately considered and this Commission issues an environmental impact statement. It concludes that any across-the-board increase in the rail freight rates would have immediate and adverse effects on the movement of recyclable materials such as paper and scrap, used glass containers, petroleum wastes, and scrap iron and steel.

National Association of Secondary Material Industries, Inc. (NASMI).—NASMI contends that the movement of nonferrous metal scrap, textile waste, paper waste or scrap, rubber or plastic scrap or waste would be adversely affected, to the detriment of the environment, by a freight rate increase and should be exempt from any emergency surcharge. It represents that the secondary material industry has developed a vast collection system, through which it reaches out over the industrial, community, and governmental generators of waste material and brings into the marketplace scrap material having an economic value; and that without recycling resources, our economy could not long survive.

NASMI asserts that the railroads inexcusably ignore the environmental impact of this rate increase; that a rate increase on recyclable commodities is inconsistent with Federal policies in that fewer secondary materials would be economically recovered from the solid waste stream; and that economic feasibility is a must to the recovery and recycling of solid waste. It illustrates the critical cost squeeze of recyclable materials by presenting the following information relating to paper stock dealers: Prices on waste commodities are declining, while other prices are spiralling upward. In 1971, the price for all paper scrap items was 32 percent below that of 1966. In comparison, freight rates have been increased 31 percent. This cost squeeze assertedly has caused the demise of many paper stock dealers and mills whose primary source of supply for the manufacturing of paper was paper waste. This situation allegedly applies also to nonferrous metal scrap and textile waste. NASMI states that, as a consequence, incentives, not economic obstacles, to the movement of recyclable waste material are needed.

NASMI points out that carloadings of waste and scrap materials dropped 4.3 percent between 1970 and 1971, which represented a decrease of 32,115 carloads a year. It urges us to exempt all secondary materials from the surcharge, and sees no barrier to such action if, as the carriers seem to allege, the rate increase is minimal.

S.C.R.A.P., the Environmental Defense Fund, Inc. (EDF), the National Parks and Conservation Association (NPCA), and the Isaac Walton League of America.—EDF is composed of more than 25,000 scientists, educators, lawyers, and other citizens dedicated to the protection of the environment and the best use of our Nation's

natural resources. It evaluates and defines environmental issues, collects research data relating to those issues, and determines the action it should take with regard to such matters. NPCA is a public service corporation with over 50,000 members. It is dedicated to the preservation, maintenance, and conservation of our natural resources. The Walton League has approximately 55,000 members, and its goal is the restoration and maintenance of the quality of the environment through the protection and wise use of our natural resources.

These groups assert that this Commission must prepare and file an environmental impact statement in conformity with section 102(c) of NEPA [49 U.S.C. 4332(2)(c)] and the guidelines of the Council on Environmental Quality [36 Fed. Reg. 7724 (1971)] prior to granting any interim rail freight charge. They state that no final administrative action may be taken sooner than 30 days after an environmental impact statement has been issued by this Commission; that a 2.5-percent freight surcharge on millions of tons of reusable refuse is clearly a major Federal action significantly affecting the quality of the human environment; and that freight rates are a major overhead factor in the collection and delivery of recyclable materials. It is argued that this Commission has recognized its responsibility to comply with the NEPA in those of its actions which significantly affect the human environment and should act accordingly in this proceeding.

These groups submit that this Commission has failed to comply with the NEPA in this proceeding because (a) the statement filed by the railroads is not an adequate environmental impact statement as outlined by the NEPA and the Council on Environmental Quality, (b) this Commission has made no provision for public comment on the texts of the preliminary environmental impact statements prepared by this Commission's staff, and (c) the surcharge was put into effect without prior adequate consideration of possible environmental consequences and is likely to cause irreparable harm to the environment. It asks that we immediately suspend the operation of the Tariff of Emergency Charges which became effective February 5, 1972.

The Merichem Company.—This industrial concern purchases petroleum refinery wastes and waste sulfide which it ships to its plant in Houston for the recovery there of small amounts of usable chemicals. Although it also purchases cresylic acids and phenol, it does not oppose increased freight charges for the movement of these commodities. It contends that the proposed surcharge, as applied to the waste materials it ships, would have a substantial adverse impact on the environment because it will seriously affect the ability of Merichem (which assertedly cannot bear any additional costs) to remove and recycle these toxic pollutants. Before Merichem was established, these wastes were released into watersheds causing serious pollution of surface and subsurface water resources. Merichem now removes virtually all of the toxic pollutants from refinery waste before disposal. In 1971, it recycled over 550-million pounds of petroleum wastes received from nearly 100 refineries. If rates are raised, Merichem states that it will divert this freight to barges wherever feasible or will abandon shipments altogether. Since the rate increases approved in Ex Parte Nos. 265 and 267, Merichem has been forced to discontinue shipments from 11 refineries. This abandonment assertedly represents 21 million pounds a year in refinery wastes that are not being recycled. Merichem has submitted for our consideration letters from the Environmental Protection Agency, which states that regional waste management like Merichem's is most desirable, and from the Bureau of Domestic Commerce of the Department of Commerce, which urges that we give all due con-

sideration to retaining the existing freight rate level on petroleum refinery waste, inasmuch as any increase would allegedly be detrimental to the recycling of waste materials that would otherwise become pollutants.

B. REPLY STATEMENT

In replying to the above environmental interests, the railroads contend that no impact statement need be completed before this Commission determines whether to allow the Ex Parte No. 261 surcharge to become effective on February 5, 1972. The carriers thus argue that the guidelines established by the Council on Environmental Quality cannot override the railroads' right under the Interstate Commerce Act to publish tariffs effective on 30 days' notice and cannot intrude on this Commission's discretionary power to suspend or not to suspend a proposed change in rates and charges. In support of this position, they cite the decision of the U.S. Court of Appeals for the Second Circuit in *Port of New York Authority* v. *United States*, 451 F. 2d 783 (1971), which found that to permit judicial interference with this Commission's suspension procedures would invite the very disruption in the orderly review of the lawfullness of proposed tariffs that the Congress meant to preclude.

The rail carriers further maintain in reply that the proposed 2.5-percent surcharge will not significantly affect the environment. They state that rail tonnage of all waste and scrap materials has risen from about 38 million tons in 1966 to 41.8 million tons in 1970, and that total consumption of iron and steel scrap increased from 73.5 million tons in 1957 to 94.8 million tons in 1969. The railroads assert that a scrap industry consultant has predicted that United States scrap consumption for steelmaking will rise 20 million tons in the 1970's.

The railroad represents that rail shipments of petroleum wastes to Merichem rose from 97.3 million pounds in 1969 to over 100 million pounds in 1971. They argue that the surcharge on representative movement of petroleum wastes will amount to about 1 cent per hundredweight or less; and that Merichem is financially capable of bearing this added expense. The railroads submit that the protestants, which have presented undocumented generalities in support of their position, have failed to demonstrate why suspension of the surcharge is essential to the preservation or enhancement of the environment.

The rail carriers argue that they cannot be required to subsidize the recycling of secondary materials; that the protestants are urging that the railroads should be deprived so that the protestants or their members may prosper; that this Commission must decide where the money to support environmental projects is to come from; and that the money can either flow from the financially troubled railroad industry or from those profit-making industries which produce or use the scrap or waste. They aver that, without the surcharge, the service protestants now depend upon will be threatened. The railroads seek to demonstrate their concern with ecological problems by pointing out that, despite inadequate earnings, rail carriers in 1970 spent approximately $10 million in a continuing effort to control and, where possible, eliminate pollution; and that they have initiated research activities in such areas as diesel emissions, human waste disposal, used tie disposal and right-of-way clearance.

The railroads note that this Commission in Ex Parte No. 265 concluded that there was little, if any, correlation between rail freight rates and the market for iron and steel scrap; and that they have been utilizing incentive rail rates since 1963 to aid in the transportation of nonferrous metal scrap. They demonstrate that the rate level on 120,000-pound shipments of these commodities is relatively the same as or below the rate level applicable above 9 years ago.

II. STATEMENTS RELATING TO [illegible]

Initial verified statements relating to the carriers' [illegible] filed February 28, 1972, have been submitted by four general categories of participants: (1) the railroads; (2) shippers and shipping associations; (3) [illegible] and (4) private environmental interests. The railroads replied to the arguments advanced against the rate increases they propose. These comments will now be considered.

A. INITIAL STATEMENTS

The railroads.—Petitioners contend that the freight rate increases they propose will have no significant environmental impact. They request this Commission to consider the following data and arguments in evaluating environmental concern: (1) the proposed selective increase falls short of the increased cost burden which has already fallen upon the railroads; (2) a number of major rail carriers are already in reorganization as a result of insufficient cash flow; (3) suspension or delay would severely impair the railroads' ability to provide adequate and efficient transportation; (4) distribution of a draft environmental impact statement and the invitation to submit comments thereon should not result in the suspension of the proposed increases; (5) denial of funds to meet increased costs will only impair the rail industry's ability to handle the very products whose movement by rail is urged by those parties interested in environmental matters; and (6) a reduction in revenues generated will impair the railroads' ability to carry out important programs designed to improve the environment. They assert that the suspension or delay of the carriers' proposal on the basis of environmental consideration would be inappropriate and inconsistent with the NEPA and the guidelines established by the Council on Environmental Quality, and contrary to the decision in *Port of New York Authority, supra.*

The rail carriers reiterate their position that there is no connection between freight rates and the consumption of iron and steel scrap and nonferrous scrap, and offer charts purporting to show that since 1967 scrap iron has improved its competitive position (extent of use) in the steel making process vis-a-vis iron ore despite increases in the rates covering the transportation of such scrap material. They also maintain that, for the years 1957 to 1970, the prices of pig iron and iron ore remained relatively stable, but the price of scrap fluctuated from $24.94 a ton to $47.10 a ton; and that the 2.5-percent surcharge favored scrap iron and steel because the average increase on scrap iron was only 14 cents per gross ton whereas the composite increase on pig iron components amounted to 28.7 cents per gross ton. The railroads aver that nonferrous metal and alloy scraps are commodities of considerable value, ranging from 1 cent to 115 cents a pound, and are not basically low valued as pig iron or iron ore and that they have aided the transportation of these commodities through the use of incentive rates. The carriers assert that the 4-percent increase proposed on these commodities would result in an increase of only 3 cents per hundredweight in the freight rate, which would increase the rate to 68 cents per hundredweight or the same rate that was effective in 1963.

In support of the proposed 4-percent increase on petroleum refinery waste and waste sulfide (with an exception), the railroads allege that rates on these commodities are at a very low level; that the proposed increase would result in charges of only $36 per car over the Ex Parte No. 267-B level; and that the net increase would be less than 1 cent per hundredweight above the charges now in effect. The railroads point out

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[redacted]

[redacted]

excessive and discriminatory in comparison to the 6-percent increase proposed on glass containers and will have an adverse impact on their ability to recycle used bottles and cans.

Merichem avers (1) that the low-valued waste commodities it processes cannot sustain the proposed rate increases; (2) that the increase will cause further diversion of this traffic to barge; (3) that the increase will not be in the public interest as it will cause and has caused a curtailment of the pollution abatement function performed by Merichem in those landlocked areas where it now operates; and (4) that the increase places waste sulfide solution at a competitive disadvantage with caustic soda and salt cake.

Protestants maintain that waste and scrap paper, textile waste, nonferrous metallic scrap, and rubber or plastic scrap or waste are extremely low valued; that transportation charges are determinative of whether they can be marketed; that an increase in rail rates will bring about the diversion of these articles to highway transportation or they simply will not move; and that the latter alternative is unacceptable because of environmental considerations. They further allege that the railroads' present and proposed rates reflect a "price bias" in favor of competing virgin materials (*e.g.*, pulpwood, woodpulp) because those rates represent too high a percentage of the value of scrap materials.

Governmental organizations.—The State of California believes that every effort should be made to encourage the use of recyclable materials to help improve environmental conditions. It, therefore, contends that no increase in freight rates for the transportation of waste and recyclable materials should be granted; that the existing 2.5-percent surcharge now applicable on such commodities should be canceled; and that the basic rates should remain in effect until this Commission has held special public hearings throughout the United States to consider the level of the rates for these specific commodities.

The General Services Administration (GSA) contends that prices of iron and steel scrap rose immediately after the 2.5-percent surcharge took effect; and that such price increases indicate that the railroad rate change did have an impact on the total prices of these commodities and, therefore, on their cost desirability to consuming steel producers. GSA states that a recent report of the Battelle Columbus Laboratories entitled, "The Impact of Railroad Freight Rates on the Recycling of Ferrous Scrap," concluded that present scrap markets are retarded because of transport rates that encourage the use of iron ore, as opposed to ferrous scrap. It asserts that the carriers' present proposal, which provides equal percentage increases on both iron ore and iron and steel scrap, can hardly be expected to improve the situation; and that the national objective is not merely to avoid curtailing the movement of these commodities, but to encourage the increased recycling of the various scrap and waste products. GSA recommends that this Commission disapprove all rate increases applicable on recyclable wastes, scrap, ash materials, and reusable shipping containers, regardless of its disposition of the balance of the railroads' selective increase proposal.

The city of New York requests that we consider environmental matters before reaching a final determination herein, and argues that such consideration should include the question whether increased rail freight rates will divert traffic to motor carriers and cause increased air pollution. The State of Rhode Island also fears a possible diversion to motor carriers which would result in increasing numbers of trucks using the highways and in growing traffic congestion, greater noise, increased air pollution, and more rapid deterioration of pavements.

The United States Department of the Interior lists possible alternatives to a rate increase which include improved economics of operation, reduced maintenance costs, purchase of more efficient equipment, increased traffic growth, and a direct subsidy to carriers. It contends that holddowns for recyclable materials may not constitute special treatment, but rather would be rectification of past biases in freight rates; that no evidence is presented which refutes the existence of discriminatory freight rates; and that there is likewise no evidence to rebut the scrap industry's charge that, based on the relative iron contents of scrap and iron ore, scrap freight rates should be 1.5 (instead of the existing 2.5) times the iron ore freight rate. Interior avers that if the scrap industry's analysis is correct, an exemption or a holddown of the freight rate increase for scrap would not appear to constitute special treatment, but rather an appropriate adjustment to correct past rate discrimination; and that if the percentage rate increase would tend to increase the discrimination of freight rates in favor of iron ore, then a holddown or exemption of scrap from the rate increase would reduce the amount of discrimination.

Interior represents that a scarcity of close-in, land-fill sites and higher land values have forced more municipalities to resort to long-haul rail shipments of waste to distant land-fill sites, that even a small rate increase for long-haul disposal could build a strong competitive position for resource cycling; that legislation is being prepared to allow tax incentives for recovery of recyclable materials, which is intended to encourage commercial recycling systems; and that increased rail rates will divert rail traffic to barges and motor carriers resulting in increased water and air pollution.

The Department of Commerce states that the salvage industry (a term covering firms collecting and processing secondary materials) consisted in 1967 of 7,927 establishments, employing 79,000 people and with total sales of $4.4 billion. Of these establishments, 3,862 were primarily engaged in handling iron and steel scrap and 4,075 were primarily engaged in handling nonferrous metals and other secondary materials. It presents data demonstrating that iron and steel scrap accounted for almost half of the total sales and copper scrap, about one-fifth.

The Department's figures show the trend in size of establishment has been towards larger firms. Of the total firms which operated the entire year, those with sales of $500,000 or more accounted for 12.1 percent in 1958, 17.6 percent in 1963, and 21.0 percent in 1967. The trend towards larger companies has been found to be related to economic and technological factors. Labor-intensive operations have led to greater use of technological innovations to increase labor productivity. The rise in the relatively expensive ferrous scrap shredder, costing from a few hundred thousand to several million dollars to install, assertedly has been occasioned by two factors: the desire to economize through large scale operation; and the need to produce better quality scrap from junk automobile bodies as opposed to baled scrap with undesirable contaminants for certain types of steel with the related need to overcome the air pollution problems of open burning (which is not required prior to shredding).

Commerce contends that in paper, the automated shredding or hammermill processing of waste grades and delivery to a high density continuous baler, reduce freight costs, facilitate materials handling and provide a better product on a handling-to-weight relation basis. To take advantage of such costly modern process equipment, centralization assertedly has taken place in the paper recycling business. The salvage industries in other commodities—textiles, glass, rubber, et cetera, have faced similar economic pressures, with the result of a general decline in the number of firms. In a number of cases, competitive factors have led to greater diversification not only into various secondary materials, but also into related activities, such as demolition, auto wrecking, metal product warehousing, and the import business. Com-

merce reveals that data on profits and other financial aspects of the secondary materials industry are virtually unavailable, primarily because most scrap companies are small, and many of them are family affairs, often partnerships or an individual proprietorship.

The Department states that secondary materials in the metals industries fall into three main categories: (1) home or revert scrap, which is almost entirely generated and consumed in the same plant, (2) prompt industrial scrap, which is generated at metal consuming plants, such as automobile manufacturing plants and returned to metal producing plants, and (3) obsolete scrap, which is derived from out-of-use metal-containing products, including those in demolished buildings. As home scrap assertedly does not move on common carriers between plants, except in rare instances, it does not appear to be a factor in rail transportation. In fact, except in the case of ferrous scrap, it is not taken into consideration in statistics on scrap sources and use. Prompt industrial scrap and obsolete scrap, taken together, constitute the broader category of "purchase scrap," in which receipts and, therefore, movement is involved. Prompt industrial scrap generally moves in large quantity shipments directly between generator and metal producer, and the scrap dealer/processor is not usually a factor in such movements. Furthermore, this type of scrap, moves—as its name indicates—promptly, and it does not constitute an environmental problem from the solid waste disposal aspects.

Commerce represents that the volume of waste paper and board recycled annually over the past 10 years has averaged about 11 million tons. This amounts to about 20 percent of the waste paper generated annually and about 22 percent of the paper and board industry fiber requirements. The more than 50 defined grades, each with its own fiber characteristics and market supply-demand situation, range widely in price.

The emphasis by the secondary materials processing industries, as expressed by their spokesmen, according to Commerce, in connection with railroad freight rate charges, has been on disparities between the base rates on primary and secondary materials as market competitors. (Whatever disparities do exist in the base rates are said to be perpetuated by equal percentage changes in rates between the primary and secondary materials.) Equity in freight rates among competing materials, as a cost of doing business, is, according to the Department, undoubtedly desirable. It points out, however, that this does not necessarily mean parity in the sense of equal rates per unit of material; and that consideration must be given to a number of factors (among them, weight, volume, density, and rail-handling procedures and techniques). This is aside from the question of rail cost and financial factors. Furthermore, the question assertedly remains as to the effect of various freight rates on the movement of these competing materials; or, more specifically, the deterrent effect of disparate rates on the movement of secondary materials according to the Department, where integrated metals producers are concerned, the consumption and demand for secondary materials is related in large part to their costs of producing the competing primary material (*e.g.*, pig iron from captive iron ore). It points out that despite changes in the relative importance of the various types of iron and steelmaking furnaces (particularly through the introduction of the basic oxygen converter, which is a relatively low user of ferrous scrap) variations in the total scrap (home and purchased) pig iron proportions of the total metallic charge have tended to cancel each other out. In 1971, the ratio was almost exactly at the 50-50 level which has prevailed over at least the entire post-World War II period.

Commerce contends that in the case of the junk car, and more particularly the abandoned junk car, on which much attention has been directed in the past several

years, the real breakthrough has been a technological one. The scrap shredder or fragmentizer, by creating higher quality scrap with fewer contaminants, has made possible the increased use of junk car scrap by both steel mills and foundaries. The remaining principal area of concern, among Federal and State agencies, is the removal of legal barriers to the fairly prompt disposal of abandoned cars. In any event, the Department believes, that a significantly faster rate of junk car disposal would have occurred without these two events, regardless of the freight rate on ferrous scrap or on the junk car hulk. One further aspect of the ferrous scrap dealer's problems in reducing freight costs, pointed out by industry representatives, is the locked-in position with respect to alternative modes of land transportation (i.e., trucks) resulting from the relative inaccessibility of such vehicles to scrap storage sites at steel mills. The Department maintains that even if the use of trucks were to increase, through changes at the steel mills, and scrap rates were to decrease, the question of equitability with rates on iron ore, which would continue to be moved by railroads, might still remain.

Commerce notes that as for the paper and board component of litter, this would appear to be solely the result of human carelessness and apathy. The salvaging of paper litter for recycling would, it maintains, be unrealistic from the cost standpoint; and the fibers would be in a general state of deterioration and contamination and essentially unusable. According to the Department, the freight rate question would, therefore, be irrelevant in terms of paper litter. With respect to wastepaper recycling, increased volumes processed at the mills actually create additional water quality and solid waste disposal problems. From 10 to 50 percent of the weight of wastepaper and board is lost in repulping depending upon grade. This includes the separation from the fibers of solids such as inks, dyes, fillers, coatings, adhesives, resins, and general nonfiber contaminants incorporated in the pack. These volumes of solid materials and chemicals are made to pose burdens on solid waste disposal land fill areas and on mill and muncipal water pollution control facilities.

According to the Department of Commerce, the question of equity in freight rates between secondary and primary materials suggest means of achieving equity which has been given consideration. This is the establishment of tax deductions equivalent to the depletion allowances made for virgin materials. Tax incentives for solid waste processing installation, similar to those allowed for air and water pollution abatement facilities, are said to be yet another possibility. On the demand side, procurement regulations have increased Federal Government use of processed paper products, but not other products. This shift at the expense of primary paper products has been justified as a conservation and antilittering measure. Price stablity in the volatile secondary materials industries might be reached through long-term contracts between buyers and sellers. The use of unit trains to achieve transportation cost economics has been mentioned, but does not appear to be feasible for the secondary materials industries, with widely scattered, small suppliers.

The United States Environmental Protection Agency contends that this Commission should examine the cumulative effects of rate increases. It asserts that an incremental freight rate increase may result in an imperceivable environmental impact, while cumulative increases may seriously degrade the environment. It states that the Council on Environmental Quality has notified this Commission that across-the-board percentage increases broaden alleged price biases against secondary materials. For example, it is alleged that if the ratio of scrap iron freight rates to iron ore freight rates were 2.5 to 1 or greater, then any across-the-board percentage increases would increase scrap freight rates 2.5 times greater than iron ore freight rate increases. EPA

states that any across-the-board increase could significantly widen the freight rate differential and could possibly affect the demand for scrap; that this Commission should examine the possibility that cumulative freight rate increases may cause a shift from rail to truck transport in the shipment of both virgin and recycled materials; that ecologist Barry Commoner in his book, "The Closing Circle," observed that the energy required to move a ton of freight a mile by rail averages 624 BTU while trucks required about 3,460 BTU per ton-mile; and that, therefore, transportation by truck causes appreciably more air pollution. A report of the Midwest Research Institute entitled "Economic Studies in Support of Policy Formulation on Resource Recovery" also is said to have found that the virgin material intensive processes are significantly more environmentally degrading than processes consuming greater percentages of recycled materials.

Private environmental interests.—The Isaac Walton League, EDF, S.C.R.A.P., and NPCA requests this Commission to issue an environmental impact statement in compliance with the NEPA and the guidelines of the Council on Environmental Quality. They state that the proposed action, changes in the National Freight Rate Structure which would avoid adverse environmental impacts; and that some of these changes assertedly include (a) creation of a special rate class for secondary materials; (b) placing each secondary material in the same rate class as the primary material for which it substitutes; (c) streamlining the procedure for charging rates for secondary materials; and (d) deregulation of vegetable produce. These parties aver that cost of service would not be incompatible with a holddown on secondary material rates, or disproportionate increase on primary materials; and that this Commission is obligated by the NEPA to consider environmental considerations at the suspension stage of a rate increase proceeding. The following represents a synopsis of the data presented by these parties.

Each year the United States produces more than 4.3-billion tons of solid refuse. Included in this figure are approximately 58.3 million tons of paper, 30 million tons of industrial fly, 15 million tons of scrap metal, 4 million tons of plastics, 100 million tires, 30 billion bottles, and 60 billion cans, most of which could be reused as raw material in various manufacturing processes. Only a small fraction of this material is reused or recycled, in large part due to the high costs of transportation.

The costs of shipping by rail have a direct impact on the movement of secondary materials in commerce. Consequently, increases in these costs are likely to have an adverse impact on the rate at which waste materials are salvaged from the environment and reused by society. As transportation appears frequently to be a large component of the total cost of secondary materials, it is likely that any increase in the freight rates for these materials will have a pervasive effect on the aggregate amount of recycling and on the cost to society of disposing of waste materials. Furthermore, because the present rate structure appears to impose lower rates for the shipment of primary materials than those for the movement of secondary materials, it is likely that any increase in freight rates for these materials will have a pervasive effect on the aggregate amount of recycling and on the cost to society of disposing of waste materials. The present rate structure appears to impose lower rates for shipment of primary materials than secondary materials, and across-the-board percentage increases will exacerbate these discrepancies and encourage more rapid depletion of nonrenewable resources. The Federal Government's leading environmental spokesmen such as Russell Train, Chairman of the Council on Environmental Quality, has

recognized that across-the-board percentage increases in freight charges perpetuate and aggravate the Nation's solid waste problem.

The environmental harm resulting from the freight rate structure has also been substantiated by Battelle Columbus Laboratories. In their report entitled "The Impact of Railroad Freight Rates on the Recycling of Ferrous Scrap" issued on January 14, 1972, Battelle's researchers concluded:

(1) Present scrap markets are retarded because of transport rates which encourage the usage of iron ore.

(2) Future scrap markets are being affected because new investment that would logically be directed to scrap-intensive steelmaking is diverted because of the existing freight rate structure to ore-intensive steelmaking.

(3) Iron ore (a limited domestic natural resource) is being exploited when it can and should be conserved.

(4) Some scrap iron that should be recycled is unable to move; thus, the environment is despoiled by unnecessary accumulations of solid metallic waste.

In addition to scrap iron and steel, other secondary industries may also be retarded by discriminatory and excessive freight rates, with consequent detriment to the environment. They conclude, but are not limited to, the following: synthetic textile and paper wastes, which if recycled would help conserve our national forests and virgin timber lands; aluminum cans and glass bottles, which require considerably less energy to recycle than to produce originally, thereby reducing the demand on our limited electric power sources and reducing pollution associated with energy production; and fly ash, a byproduct of fossil fuel combustion, which can be recaptured and used as roadfill or for other construction purposes.

Although many people think of recycling as a solid waste problem only, across-the-board freight rate increases may also affect recycling of liquid waste (*e.g.*, petroleum wastes) and gaseous wastes (reclamation of sulfur from sulfur dioxide, for example). Waste sulfide, for instance, offers a classic example of how across-the-board increases in the present rate structure can frustrate recycling and contribute to pollution of the environment.

Waste sulfide is essentially a spent caustic soda byproduct solution derived by processing oil refinery wastes. Its largest potential use is as a chemical required in the papermaking process. According to the testimony submitted by Merichem Company in Ex Parte No. 265, waste sulfide competes in this market with salt cake, which contains soda and is shipped via rail as 98-100-percent usable material, and with caustic soda, which is normally shipped to papermills in a 50-percent usable solution form. Waste sulfide, however, which also contains soda, is limited by tariff restriction to contain not more than 20-percent usable material.

On a chemically equivalent basis, however, these three commodities sell for essentially the same price per ton. Therefore, while waste sulfide must compete at essentially the same price, the same amount of freight rate increase has a much greater impact on the waste sulfide cost structure than on the cost structures of the competitive materials because waste sulfide must be shipped in much more dilute form.

In actual dollar costs there is a tremendous inequity in the effect of a rate increase on waste sulfide as compared to its competition. On a "usable" material basis, a 1 cent per hundredweight, freight increase has the effect on only a 20-cent per ton increase in the transportation cost of 98-100-percent usable salt cake; a 40-cent per ton increase in the transportation costs of 50-percent usable caustic soda, but a $1 per ton increase in the transportation of 20-percent usable waste sulfide. Therefore, the same amount of increase on the three competitive materials has a 250-percent greater im-

pact on the waste sulfide cost structure than on caustic soda, and a 500-percent greater impact on that structure as compared with that on salt cake.

The environmentalist allege that despite accumulating evidence of the adverse impact of increased freight rates on recycling, this Commission's response has been to continue to grant the railroads across-the-board percentage rate increases after only the most superficial examination of the impact these increases have on the secondary materials industry and ultimately on the environment. They point out that since this problem was first called to our attention in 1968, four across-the-board increases have been granted and a fifth is now under consideration.

The environmentalists theorize that even without analyzing the deficiencies of the present rate structure, this Commission can perform fairly straightforward tests to predict the environment impact of the present proposed rate increases. For instance, in some production processes, secondary and primary materials compete directly. At the point where a secondary material substitutes for a primary one, the market should equalize the marginal costs of these competing inputs. A percentage rate increase, therefore, will have a differential impact on consumption of these competing inputs depending upon the fraction of their total cost which is represented by the cost of rail transportation. If the fraction of rail transportation is higher for a secondary material than it is for a primary one (measured at the point where the secondary can be directly substituted for the primary), then the percentage rate increase will increase the price of the marginal unit of the secondary material more than the price of the marginal unit of the primary one. Primary material will then be substituted for secondary until the costs of the marginal units are again equalized. Although a small percentage increase in freight rates may result in a smaller differential between the primary and secondary materials, it nevertheless appears that for even a very small increase in the price differential, very large amounts of primary material may be substituted for the directly competing secondary material before the equilibrium of marginal costs is restored.

The environmentalists admit that often primary and secondary materials are not direct substitutes. For example, a package of both iron ore and coke substitutes for scrap iron. The above test would then apply to the package of materials (including the primary one) which competes directly with the package of materials (which includes the secondary material).

The environmentalists believe that the 2.4-percent rail freight increase will probably have effects on other transport rates. It is asserted that, if other rates also increase, we need to compare the fraction of transportation, in all its forms, of the primary materials with the fraction for the secondary materials. Increase of all rates, not just the "final move by rail" is assertedly likely to have greater adverse effects on the movement of secondary materials.

These parties finally point out that primary and secondary materials are often not perfect substitutes. Secondary materials may have more impurities as well as greater variability in scheduling and pricing. These differences may lead to premiums placed on primary materials, which need also to be taken into account.

B. REPLY STATEMENT

The railroads do not believe that an environmental impact statement is required in this proceeding by the NEPA, but requests that this Commission issue such a statement out of an abundance of caution. They assert that the proposed increases should be permitted to take effect as published, subject to refund and subject to the final environmental statement and decision of this Commission. They allege that EDF and

allied interests have not supplied any factual material for the record and their unsupported assertions are not entitled to any weight; and that the economic analyses offered by the environmentalists are unduly simplistic, do not consider transportation costs and factors, and do not provide a reliable basis for drawing any conclusions as to whether or not the selective increases proposed will have a significant impact on the environment.

With references to petroleum refinery wastes, the rail carriers assert that Merichem is financially capable of operating pursuant to the proposed increases. They note that these commodities can be disposed of by alternative methods which are ecologically sound, such as incineration at the refinery, sale to other buyers of refinery waste in Washington and California, treating with flue gas to remove the sulphur, and sale direct to papermills without intermediate processing. The railroads contend that Merichem has not shown what it pays the refineries for petroleum waste nor has it made any attempt to show why the refineries should not pay to have thier wastes removed in an ecologically sound manner.

The railroads represent that the wastepaper interests have failed to present reliable facts to support their assertions concerning NASMI's argument that there are inequities in freight rates between wastepaper and woodpulp, they point out that the average length of haul within the United States of wastepaper is only 329 miles compared with 865 miles in the case of woodpulp, with average revenue per car of $247 on wastepaper and $663 on woodpulp. It is submitted that these different transportation characteristics necessitate different rate treatment. In response to NASMI's assertion that diversion to highway transportation will occur if the proposed increase is approved, the rail carriers aver that rail tonnage has remained at least constant during 1968, 1969, and 1970 notwithstanding the four rate increases approved by this Commission; and that the railroads earn $236 and $270 per carload of wastepaper at their existing 40,000- and 50,000-pound rates compared with average per car earnings on woodpulp of $663.

The rail carriers maintain that NASMI has made no showing that traffic trends indicate that rail increases have produced or are likely to produce diversion of traffic; that NASMI speaks of the vast accumulation of solid waste that constitutes potential recyclable material, but offers no indication that such normally discarded waste has ever moved to recycling plants by rail; and that there is no relationship between the growing accumulation of discarded textiles and rail freight rates.

The railroads take the position that there is no relationship between freight rate increases and the level of activity in the scrap iron industry, and that there are significant differences in transportation characteristics between scrap iron and iron ore. They allege that the Battelle Study omits consideration of a number of significant factors entering into the decision of the steelmaker to use scrap iron vis-a-vis hot iron (such as capital requirements, geography, and access to markets), and constitutes an oversimplification of the variations that exist between different processes within the steel industry itself.

The rail carriers emphasize that the domestic consumption of scrap iron fluctuated in substantial measure between 1961 and 1966, during which time there were no general freight rate increases and rose to an all-time peak in 1969 after three general freight rate increases; and thus prices of scrap between 1961 and 1969 fluctuated significantly without relation to increases in freight rates or the absence thereof.

In reference to fly ash, the railroads find no sound reason to exempt this commodity from the proposed increase which they regard as modest. They do not believe the rate increase will affect the movement of fly ash.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 27th day of September 1972.

EX PARTE NO. 281

INCREASED FREIGHT RATES AND CHARGES, 1972

The Commission having this day made a report on its investigation of increases in freight rates and charges proposed by common carriers by railroad in the United States in their petitions filed December 13, 1971 (surcharge), and February 28, 1972 (selective increases), and subsequent petitions related thereto, said report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That changes in freight rates and charges, to the extent authorized herein, may be made effective upon notice to the Commission and the general public of 15 days with respect to commodities not moving in the recycling process and 35 days in the case of commodities being transported for purposes of recycling, by filing and posting in the manner prescribed in the act.

It is further ordered, That, subject to the same (15-day) notice requirement and contemporaneously with effective implementation of the authority relating to non-recyclable commodities contained in the preceding paragraph, respondents be, and they are hereby, required to cancel (1) the surcharge tariff, as amended, and (2) the selective increase schedules to the extent not approved herein.

It is further ordered, That outstanding orders in other proceedings be, and they are hereby, modified so as to permit establishment of the further changes in interstate freight rates and charges herein authorized.

It is further ordered, That all tariff schedules changing interstate rates or charges under the authority of this order, which rates or charges are maintained or held in force by virtue of outstanding orders of the Commission, shall make specific reference to this order.

It is further ordered, That in making effective any increases in rates or charges herein authorized, the respondents be, and they are hereby, required to protect and maintain all established port relationships and to apply any such increases on export or import traffic subject to the limitations provided in this report.

And it is further ordered, That this proceeding be, and it is hereby, discontinued.

SUPPLEMENTAL FOURTH SECTION ORDER NO. 20367

It appearing, That, the Commission, by fourth section order No. 20367, entered December 21, 1971, in Ex Parte No. 281, Increased Freight Rates and Charges, 1972, as modified and amended by supplemental order No. 20367, entered February 1, 1972, authorized carriers parties to the proceeding to establish and maintain the increased rates and charges described therein without observing the provisions of section 4 of the Interstate Commerce Act;

And it further appearing, That carriers parties to the proceeding applied for relief from the provisions of section 4 of the act necessary to establish the rates and charges sought; that the increase in rates and charges authorized herein cannot be published and made effective without producing in some instances rates or charges that yield

greater compensation in the aggregate for the transportation of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, or greater compensation as a through rate or charge than aggregate of intermediate rates or charges subject to the act, in contravention of section 4 thereof;

It is ordered, That fourth section order No. 20367, entered, modified, and amended as aforestated, be, and it is hereby, further modified and amended by adding thereto the following paragraphs:

It is further ordered, That, carriers subject to the Interstate Commerce Act and parties to said proceeding be, and they are hereby, authorized to depart from the provisions of section 4 to the extent necessary to establish and maintain the increases in rates and charges authorized in the order in Ex Parte No. 281 of this date.

It is further ordered, That, carrier parties to said proceeding be, and they are hereby, authorized to establish and maintain rates and charges authorized in the order of this date, without observing the long-and-short-haul provision of section 4 of the act in cases arising out of the failure to apply the full increases in rates and charges over interstate routes between points in a single State, in turn caused by failure of the State authorities to authorize the full increases permitted in said proceeding.

And it is further ordered, That in those instances in which rates in contravention of section 4 are established under authority contained herein, the schedules containing such shall make reference to this order in the manner required by rule 28 of Tariff Circular No. 20.

AMENDMENT TO SPECIAL PERMISSION NO. 72-2600, as amended, AUTHORIZING CERTAIN DEPARTURES FROM THE COMMISSION'S PUBLISHED TARIFF REGULATIONS

It is ordered, That Special Permission No. 72-2600, as amended, be, and it is hereby, further amended to permit the establishment of the increases in freight rates and charges authorized by the Commission in this order, subject to the terms, conditions, and limitations therein.

It is further ordered, That said special permission, as amended, be, and it is hereby further modified and amended so as to provide that all rule relief authorized shall expire on July 13, 1973, in lieu of January 13, 1973, and that the special permission, as amended, shall be void as authority for filing on and after June 12, 1973.

And it is further ordered, That, in all other respects, the terms of the original permission, as heretofore amended, shall remain the same.

By the Commission.

(SEAL)

ROBERT L. OSWALD,
Secretary.

APPENDIX E

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 2nd day of May, 1973.

EX PARTE NO. 281

INCREASED FREIGHT RATES AND CHARGES, 1972
(Environmental Matters)

The Commission having thus made a report on its investigation of the environmental effects of increases in rail freight rates and charges on the movements of commodities being transported for the purposes of recycling approved by this Commission in the prior report in this proceeding (341 I.C.C. 288); that this said report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission.

ROBERT L. OSWALD,
Secretary.

[SEAL]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-1966 and 73-1971

ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL.,
Appellants,

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), ET AL., *Appellees.*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants,*

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), ET AL., *Appellees.*

On Appeal from the United States District Court for the District of Columbia

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MOTION OF THE INSTITUTE OF SCRAP IRON AND STEEL, INC. TO DISMISS

Appellee, Institute of Scrap Iron and Steel, Inc., was granted leave by the lower court to intervene June 27, 1973, subsequent to the previous consideration of

this case by this Court. It has participated fully in the administrative proceeding before the Interstate Commerce Commission (ICC).

I. THESE APPEALS MUST BE DISMISSED FOR LACK OF JURISDICTION

Appellee, Institute of Scrap Iron and Steel, Inc., respectfully moves, pursuant to Rule 16 of this Court, to dismiss the appeals of *Aberdeen and Rockfish Railroad Company, et al.* and *United States and Interstate Commerce Commission,* Nos. 73-1966 and 73-1971, because this Court does not have jurisdiction. Appellants ground jurisdiction on 28 U.S.C. § 1253. No jurisdiction exists under § 1253 because no party appeals "from an order granting or denying . . . an interlocutory or permanent injunction."[1]

The two cases cited by Appellants in support of their contention that jurisdiction exists, *Baltimore & Ohio R.R.* v. *United States,* 386 U.S. 372 (1967) and *United States* v. *Allegheny-Ludlum Steel Corp.,* 406 U.S. 742 (1972), were appeals from orders denying an injunction which had been sought by the appellant or appeals from orders granting an injunction which had been op-

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[1] 28 U.S.C. § 1253, upon which Appellants based this Court's jurisdiction [Government's jurisdictional statement (Gov. J.S.) p. 2, and the Railroad's jurisdictional statement (R.R.J.S.) p. 2] provides:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

28 U.S.C. § 2101(b), cited by the ICC in its jurisdictional statement, p. 2, merely sets forth the time in which appeals under § 1253 must be brought.

posed by the appellants.[2] Appellants, in the instant case, successfully opposed injunctive relief in the court below.[3] The cases cited, thus, are inapposite. "[T]he successful party below has no standing to appeal from the decree denying the injunction." *Public Service Comm'n* v. *Brashear Freight Lines, Inc.*, 306 U.S. 204 at 206 (1939).

The instant case must be dismissed without direction to the lower court because the jurisdictional issue obviously is settled. *Cf. Phillips* v. *United States*, 312 U.S. 246 at 254 (1941) and *Rorick* v. *Bd. of Comm'rs*, 307 U.S. 208 at 213 (1939). In any case, it is clear that the questions presented are not sufficiently substantial to merit appellate review.

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[2] *Baltimore and Ohio R.R.* v. *United States, supra*, involved an appeal by parties who had sought an interlocutory injunction which was denied by the district court. *United States* v. *Allegheny-Ludlum Steel Corp., supra*, involved two separate cases, one in which the plaintiff had sought and been denied an injunction and the other in which the ICC had opposed an injunction which was granted by the lower courts.

[3] The district court's judgment provides that:

"[T]he Interstate Commerce Commission's orders of October 4, 1972 and May 2, 1973 in Ex Parte 281 are vacated and this case is remanded to the Commission for further proceedings consistent with the opinion in this case."

In its opinion, the Court stated:

"[W]e refrain from issuing an injunction restraining the railroads from collecting the increased rates pending the Commission's reconsideration." *Students Challenging Regulatory Agency Procedures (S.C.R.A.P.)* v. *United States*, 371 F. Supp. 1291 at 1293 (D.D.C. 1974).

II. THESE APPEALS SHOULD BE DISMISSED BECAUSE THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

Apart from jurisdictional grounds, the instant appeal should be dismissed because the questions presented are not substantial. In essence, four questions are presented by Appellants in their jurisdictional statements. In examining these questions, it is necessary to place the lower court's decision in its proper perspective.

This decision does not prejudice the financial position of the railroads. As the appellant railroads concede in their jurisdictional statement (R.R.J.S. at 14), "the increases on recyclables were placed in effect [June 10, 1973] *and continue in effect today.*" [emphasis added.] The railroads are not precluded by the lower court's decision from seeking further rate increases on recyclable commodities.

What this decision does do is simply stated: it requires the ICC to comply with the procedural requirements of the National Environmental Policy Act (NEPA) before the Commission gives its official blessing to the rate increases. As the ICC has pointed out, the decision of the lower court has a technical effect on the burden of proof in the event that a shipper challenges a particular rate.[4]

Strict compliance with NEPA in the instant case is necessary, even though this proceeding should not be viewed as typical of all future ICC rate-making proceedings. Rather, it must be viewed as the crucial test of the question of whether the ICC will give full credence to the procedural mandates of NEPA in evaluat-

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[4] The ICC concedes that the primary result of vacating its October 4, 1972 and May 2, 1973 orders is that the burden of proof does not shift automatically to shippers (Gov. J.S. at 13).

ing whether freight rates for recyclable commodities are discriminatory. The full consideration of such issues as the discriminatory effect of general rate increases or of the existence of discrimination in the underlying rate structure in this proceeding, as required by NEPA, may well establish the precedent for consideration of similar issues in future proceedings before the Commission.

In summary, the lower court's decision poses no threat either to the financial position of the nation's railroads or to the orderly administration of the Interstate Commerce Act. This decision, however, does maintain the integrity of NEPA by requiring the Commission to observe the Congressional mandate that it consider fully the environmental impact of its actions.[5] Viewed in this perspective, the questions presented by Appellants in their jurisdictional statements are insubstantial. Summary dismissal of these appeals or affirmance of the lower court's decision would be warranted even if the threshhold jurisdictional bar in 28 U.S.C. § 1253 were not present.[6]

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[5] Strict compliance by the ICC is important. A number of courts have been critical of the recalcitrance of the Commission in acknowledging and complying with the mandates of NEPA, *Harlem Valley Transp. Ass'n* v. *Stafford*, No. 73-2496, slip opinion No. 685 at 4278 (2d Cir. 1974); *City of New York* v. *United States*, 337 F.Supp. 150 at 158 (E.D.N.Y. 1972); *Chemical Leaman Tank Lines* v. *United States*, 368 F.Supp. 925 at 948 (D.Del. 1973); *S.C.R.A.P.* v. *United States*, 346 F.Supp. 189 at 194, n.8 (D.D.C. 1972).

[6] Rule 16(1)(c) and (d) of the rules of this Court.

The four questions raised by Appellants follow:

A. The Railroads Assert Lack of Jurisdiction in the Lower Court To Review the General Revenue Order for Failure To Comply with NEPA

In contrast to the clear jurisdictional barrier raised by 28 U.S.C. § 1253 to prosecution of the instant appeal, the Appellant railroads rely on unclear judicial precedent in seeking to deny the right of judicial review of the Commission's compliance with NEPA.[7] In *Atchison, Topeka and Santa Fe Ry. Co.* v. *Wichita Bd. of Trade,* 412 U.S. 800 (1973), this Court recognized that the jurisdictional issue is not settled.[8]

The lower court in the instant case held that even if there were no provision for review in the Interstate Commerce Act, NEPA conferred jurisdiction upon the courts to review for compliance with NEPA any major Federal action significantly affecting the quality of the human environment. The ICC order was such action.[9] Appellant railroads' expansive reading of *S.C.R.A.P., supra* (R.R.J.S. at 17-18), to the effect that NEPA made no change in the jurisdictional standards previously established for Interstate Commerce Act pro-

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[7] R.R.J.S. at 17-22.

[8] This Court observed that "serious questions" exist concerning the jurisdiction of district courts to review general revenue orders, 412 U.S. 800 at 814, n.10. This Court, in two recent cases arising under the Interstate Commerce Act without the additional issues posed by NEPA, left standing, by an equally divided court, the lower court holdings of lack of jurisdiction. *Atlantic City Elec. Co.* v. *United States,* 306 F.Supp. 338 (S.D.N.Y. 1969); *Alabama Power Co.* v. *United States,* 316 F.Supp. 337 (D.D.C. 1969), *aff'd.* 400 U.S. 73 (1970).

[9] 371 F.Supp. at 1297-8. See also, *Comm. for Nuclear Responsibility* v. *Seaborg,* 463 F.2d 783 (D.C.Cir. 1971), discussed by the lower court at n.22.

ceedings, is not supported by the Court's opinion. *S.C.R.A.P.* dealt only with the jurisdiction of the lower court to order injunctive relief in the course of a general revenue proceeding. The Court specifically noted that it was not expressing a view on the jurisdiction of the lower court to review the general revenue order for compliance with NEPA.[10]

It is unnecesary for this Court to reach the question of whether there may be judicial review of general revenue orders. First, NEPA review of general revenue orders is unlikely to be a recurring issue in the courts since the present administrative proceeding should resolve many of the fundamental issues involved. Second, a case with the peculiar permutations created by the applicability of NEPA to general revenue proceedings is not an appropriate case to resolve the fundamental question under the Interstate Commerce Act of the reviewability of general revenue orders.

B. The ICC Asserts that It May Decide When It Will Comply With NEPA

Although stating that "the Commission is well aware of the need for a thorough study of the basic railroad freight rate structure . . . ," (Gov.J.S. at 14), it asserts in its jurisdictional statement that it has exclusive discretion to determine when it will comply with NEPA (Gov.J.S. at 15-17) by doing so. Congress made no provision for such agency discretion in § 102 of NEPA. To the contrary, Congress mandated that:

> "[A]ll agencies of the Federal Government *shall* . . . (1) include in *every* major Federal action significantly affecting the quality of the human envir-

[10] 412 U.S. 669 at 698, n.22.

onment, a detailed statement . . . on the environmental impact of the proposed action . . . ."[11] [emphasis added]

The President's Council on Environmental Quality has indicated in the guidelines on the preparation of environmental impact statements which it addressed to all Federal agencies that the cumulative effect of governmental actions are to be considered by each agency in its review of specific agency actions.[12] The Court of Appeals for the District of Columbia Circuit has affirmed the obligation of an agency to take into account decisions predating enactment of NEPA when a subsequent decision relating to the same matter is properly before the agency. *Calvert Cliffs' Coord. Comm.* v. *Atomic Energy Comm'n,* 449 F.2d 1109 at 1128-9 (D.C.Cir. 1971). The obligation of the ICC to consider all aspects of the question of the impact of freight rates on recyclable commodities is so clear as not to require further judicial review in this proceeding.

C. Appellants Assert that the Lower Court Improperly Reviewed the Commission's Substantive Determinations

Both the railroads and the ICC have asserted in their jurisdictional statements that this Court should review the lower court's decision because that decision was predicated upon its disagreement with the conclusions

[11] 42 U.S.C. § 4332(2).

[12] "The statutory clause 'major Federal actions significantly affecting the quality of the human environment' is to be construed by agencies with a view of the overall, *cumulative impact* of the action proposed (and of further actions contemplated) . . . ." [emphasis added] (Sec. 5(b), 36 Fed. Reg. 7724, revised August 1, 1973, § 1500.6(a), 38 Fed. Reg. 20550)

set forth in the Commission's impact statement (R.R. J.S. at 22-27 and Gov.J.S. at 18).[13]

The lower court specifically disavowed review of the statement on the merits, making clear that it reviewed that statement only for compliance with the procedural requirements of NEPA:

> "Any substantive review would be predicated on Section 101 of the Act . . . . However, because we view the Commission's efforts to comply with NEPA's procedural commands to be sorely deficient, we do not reach the question whether the Commission clearly gave insufficient weight to this environmental value." [14]

Appellants suggest that because the lower court questioned whether the ICC had come to grips with the environmental issues in good faith, it substituted its judgment on the question of whether the freight rates on recyclable commodities should be increased.

As Appellants acknowledge,[15] the basic test evolved by the lower courts for testing an agency's compliance with the procedural mandate of § 102(2) of NEPA is whether the agency has made a good faith effort to prepare an adequate, rather than a perfunctory, examina-

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[13] The railroads define the issue presented as "whether NEPA intended to sanction judicial review . . . of the substantive merits of the agency's impact statement determinations," R.R.J.S. at 22. The Government suggests that "the court substituted its judgment for that of the ageney concerning the matters discussed in the impact statement," Gov.J.S. at 18.

[14] 371 F.Supp. at 1299.

[15] R.R.J.S. at 22 and Gov.J.S. at 17.

tion of the environmental implications of the action or series of actions under consideration.[16]

The lower court in the instant case found that the ICC had not engaged in the good faith analysis required by NEPA. It based this finding in large part on the failure of the Commission to consider or to respond to issues raised repeatedly during the proceeding before the Commission, not only by environmental and shipping interests, but also by other governmental agencies, including the Enviromental Protection Agency, the Council on Environmental Quality and the Department of Commerce.[17]

This *procedural* review of the impact statement—to determine whether issues and viable alternatives are considered in sufficient detail and in good faith—is essential if the judiciary is to exert more than perfunctory supervision over compliance with NEPA. This review is clearly distinguishable from *substantive* re-

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[16] *Environmental Defense Fund* v. *Corps of Engineers*, 342 F. Supp. 1211 at 1214 and 1217 (E.D.Ark. 1972); *Environmental Defense Fund* v. *Corps of Engineers*, 470 F.2d 289 at 296 (8th Cir. 1972); and *Sierra Club* v. *Froehlke*, 359 F.Supp. 1289 at 1342 (S.D.Tex. 1973).

[17] In this connection, it is important to note that the lower court's conclusion of procedural inadequacies is an affirmance of the findings of the Federal agencies charged with administering NEPA. Both EPA and CEQ pointed out inadequacies in the ICC's draft impact statement. EPA gave the statement an "inadequate rating" and wrote again to the Commission following publication that the statement was inadequate. See letter of Russell E. Train, Chairman, CEQ, to George M. Stafford, dated April 17, 1973; letter of Sheldon Meyers, Office of Federal Activities, EPA, to Robert L. Oswald, dated April 19, 1973; and letter of John Quarles, Acting Deputy Administrator, EPA, to Robert L. Oswald, dated June 6, 1973, all part of the record in the court below.

view, where the question is not one of whether the issues and alternatives were given sufficient consideration, but one of whether arbitrary or capricious conclusions were reached by the agency after the requisite procedural compliance.[18] The issue sought to be raised by Appellants is not present, since the lower court did not challenge the conclusions of the ICC, but merely the adequacy and good faith of the Commission's consideration of the environmental impact.

Even if this Court had jurisdiction to review this appeal, it would be undesirable for the Court to review the lower court's determination of inadequate procedural compliance. This would require the Court to become enmeshed in the voluminous record in this case in order to determine whether a good faith effort at compliance with the requirements of NEPA occurred.[19]

Appellate review of the lower court's finding that the ICC had not complied with the procedural requirements of NEPA is unwarranted.

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[18] The test of substantive review of agency actions under NEPA was set forth in *Calvert Cliffs' Coord. Comm.* v. *Atomic Energy Comm'n, supra,* at 1115:

> "The reviewing courts probably cannot reverse a substantive decision on its merits, under Section 101, unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values . . . ."

[19] This Court, on numerous occasions, has noted the limited scope of review of questions such as that raised by Appellants, *e.g., Nat'l Labor Relations Bd.* v. *Pittsburgh Steamship Co.,* 340 U.S. 498 at 502-503 (1951); *Nat'l Labor Relations Bd.* v. *American Nat'l Ins. Co.,* 343 U.S. 395 at 410 (1952).

D. Appellants Assert that the ICC Should Not Be Required To Hold a Hearing on Its Draft Impact Statement

Appellants have asserted that it was error for the lower court to direct the Commission on remand to hold oral hearings on the draft impact statement (Gov.J.S. at 18-21 and R.R.J.S. at 29-32). Since the lower court found the failure to hold a hearing to be only one indication that the ICC failed to undertake good faith procedural compliance with NEPA, the issue raised by Appellants is in reality a request for an advisory opinion on how the Commission should conduct itself on remand in light of the lower court's suggestion that a "presumption" exists that oral hearings are required.[20]

The existing ICC review process in general revenue proceedings encompasses both oral hearings and oral argument. Such hearings and argument were conducted in the course of the administrative proceeding before the Commission prior to issuance of the order of October 4, 1972, approving the rate increases, which order was vacated by the lower court. The district court's presumption that the Commission also should hold oral hearings on the revised impact statement in order to comply with NEPA's mandate that the impact statement be part of the "existing agency review process" does not present this Court with an issue of substance.

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[20] A presumption confirmed by the Second Circuit, June 18, 1974, in *Harlem Valley Transp. Ass'n* v. *Stafford, supra,* at 4289-4292, where the court held that the ICC was required to prepare a draft environmental impact statement prior to its hearing on abandonment of rail lines. This requirement was based on the affirmative obligation of the ICC to develop the environmental issues rather than await their presentation by environmental interests.

CONCLUSION

The appeals should be dismissed (1) because of clear lack of jurisdiction; (2) even were there jurisdiction, because of the insubstantial nature of the questions presented.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ABERDEEN AND ROCKFISH RAILROAD CO., *et al.*,

Appellants,

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), and ENVIRONMENTAL DEFENSE FUND, NATIONAL PARKS AND CONSERVATION ASSOCIATION, and IZAAK WALTON LEAGUE OF AMERICA (EDF, *et al.*)

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

For the reasons set forth below, appellees Environmental Defense Fund, National Parks and Conservation Association, and Izaak Walton League of America ("EDF, *et al.*") move, pursuant to Rule 16 of the Rules of the Supreme Court, to dismiss these appeals for lack of jurisdiction, or in the alternative, to affirm the

decision and order of the court below, entered on February 10, 1974, from which these appeals are taken.

I.

THIS COURT LACKS JURISDICTION TO ENTERTAIN THE PRESENT APPEALS.

Both appellants United States of America and Interstate Commerce Commission (the "Government") and appellants Aberdeen and Rockfish R. Co., *et al.*, (the "Railroads") assert as the sole basis for this Court's jurisdiction 28 U.S.C. §1253.[1]

Section 1253 provides that:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court *from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction* in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." (Emphasis added.)

This case, however, does not involve an "appeal to the Supreme Court from an order granting or denying . . . an . . . injunction." See *Public Service Comm'n v. Brashear Freight Lines, Inc.*, 306 U.S. 204 (1939).[2] While the court below did deny an injunction

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[1] Government's Jurisdictional Statement ("Gov.J.S."), p.2; Railroads' Jurisdictional Statement ("R.R.J.S."), p. 2. Although the Government also cites 28 U.S.C. §2101(b), it is clear that this section relates solely to the timing of the appeal, and creates no independent basis for jurisdiction.

[2] *See also Mitchell v. Donovan*, 398 U.S. 427, 429-31 (1970); *Rockefeller v. Catholic Medical Ctr.*, 397 U.S. 820 (1970); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 152-55 (1963); *Perez v. Ledesma*, 401 U.S. 82, 86-87 (plurality opinion per Black, J.), 89 (Stewart and Blackmun, J.J., concurring), 96

which had been sought by appellees, 371 F.Supp. at 1307-10, *no party now appeals from that denial.* The order appealed from by appellants provides merely that:

> "It is ORDERED that the Interstate Commerce Commission's orders of October 4, 1972 and May 2, 1973 in Ex Parte 281 are vacated and this case is remanded to the Commission for further proceedings consistent with the opinion in this case." Gov.J.S., p. 2b.

This order is plainly not an injunction. As this Court stated in *Gunn v. University Committee to End the War,* 399 U.S. 383, 389 (1970), "an injunctive order is an extraordinary writ, enforceable by the power of contempt."

Nothing in the opinion below suggests that this order "was intended to carry contempt sanctions," *Taylor v. Board of Education, Etc.,* 288 F.2d 600, 604 (2d Cir. 1961), *cert. den.,* 368 U.S. 940 (1961). The lower court did not characterize its order as an injunction, and appellants refrain from so characterizing it in their jurisdictional statements.[3] Nor does this order follow the requirements for an injunction as to form.[4]

The lower court, *which specifically refused to enjoin collection of any of the increased freight rates in issue* (371 F.Supp. at 1307-10) explained (*id.* at 1308, n. 50) that:

(Brennan, White, and Marshall, J.J., concurring in part and dissenting in part) (1971); *Gunn v. University Committee to End the War,* 399 U.S. 383, 386-88 (majority opinion per Stewart, J.), 391 (White and Brennan, J.J., concurring) (1970).

[3] See Gov.J.S., p. 10; R.R.J.S., p. 17.

[4] See *Gunn, supra,* 399 U.S. at 388 ("Rule 65(d) of the Federal Rules of Civil Procedure provides that any order granting an injunction 'shall be specific in terms' and 'shall describe in reasonable detail * * * the act or acts sought to be restrained.' ")

"The only consequence of our vacating the Commission's orders pending reconsideration of the rate increases 'is that the railroads may not rely, in some subsequent proceeding, on a Commission finding that the proposed rates were just and reasonable. In an action for reparations, for example, the railroads could not gain any benefit from the purported Commission approval of the increases.' Atchison, Topeka & Santa Fe R. Co. v. Wichita Board of Trade, . . . 412 U.S. at 818 . . . ."

The Government adopts this assessment (Gov.J.S., p. 10, n. 8), and concedes (*id.* at 13) that the effect of the Commission's general revenue orders, such as those vacated below, is "simply to shift the burden of proof" in possible subsequent proceedings.

Thus, in vacating these orders, the lower court granted no more, in effect, than a declaratory judgment as to where the burden of proof would lie if "some subsequent proceeding" were commenced.

Nor, obviously, did the lower court grant an injunction merely by "remand[ing the case] to the Commission for further proceedings consistent with the [court's] opinion," *i.e.*, for another attempt to prepare an adequate environmental impact statement, pursuant to § 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C), for the holding of a hearing, and for reconsideration of the vacated orders. No one has suggested that the Commission risks contempt if its revised impact statement, like the previous one, is found to be deficient in scope and analysis. As the Court of Appeals for the Second Circuit (Friendly, J.) observed in *Taylor v. Board of Education, Etc., supra,* 288 F.2d at 604:

"[J]ust as not every order containing words of restraint is a negative injunction . . . so not every

order containing words of command is a mandatory injunction . . . ."

This Court has held on numerous occasions that its jurisdiction to hear direct appeals from three-judge courts is to be construed narrowly and technically, because "any loose construction . . . would defeat the purposes of Congress . . . to keep within narrow confines our appellate docket." *Phillips v. United States*, 312 U.S. 246, 250 (1941). See also *Goldstein v. Cox*, 396 U.S. 471, 478 (1970); *Stainback v. Mo Hock Ke Lock Po*, 336 U.S. 368, 375 (1949); *Moore v. Fidelity & Deposit Co.*, 272 U.S. 317, 321 (1926).

This canon of narrow and technical interpretation is specifically applicable in determining whether an "injunction" is at issue for purposes of 28 U.S.C. § 1253. *Mitchell v. Donovan*, 398 U.S. 427, 429-31 (1970); *Rockefeller v. Catholic Medical Ctr.*, 397 U.S. 820 (1970); *Gunn, supra; cf. Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 152-55 (1963).

Since the order below is not an injunction under any conventional test, *a fortiori* it is not an injunction under the stringent test applicable in construing § 1253. Indeed, if this order were an injunction for § 1253 purposes, it would be hard to imagine an order that was not.

In sum, the only injunction at issue below was the one sought by appellees—not appellants—and refused by the district court. 371 F.Supp. at 1307-10. Appellants, having prevailed as to that injunction, lack standing to appeal from their victory. *Brashear, supra*, 306 U.S. at 206-07; *Gunn, supra*, 399 U.S. at 390, n. 5. "And as no appeal has been taken to review the decree denying the injunction, this Court is without jurisdiction," *Brashear, supra*, 306 U.S. at 207.

The law on this jurisdictional issue is plain, unambiguous, and long-settled. It requires that the present appeals be dismissed. *Brashear, supra,* 306 U.S. at 207; *Hutcherson v. Lehtin,* 399 U.S. 522 (1970).

II.

IT IS MANIFEST THAT THE QUESTIONS ON WHICH THE DECISION OF THE CAUSE DEPENDS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

Apart from the fatal jurisdictional flaw just noted, it is plain that the questions presented by these appeals are unsubstantial and were decided correctly below. The arguments on which these appeals are based are as follows:

1. *That the Commission's compliance with the National Environmental Policy Act in its general revenue proceedings is immune from judicial review.*

This argument is advanced principally by the Railroads (R.R.J.S., pp. 18-22; cf. Gov.J.S., p. 13, n. 9). The Railroads do not contend that judicial review of the Commission's general revenue proceedings is precluded by statute. Nor do they claim that the statute which was found below to have been violated, § 102 of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332, is so broadly drawn as to provide no "law to apply." *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 410 (1971).

Rather the Railroads rely on a line of cases[5] in which review of a general revenue order was held

[5] See cases cited at R.R.J.S., p. 20, n. 6.

premature–under judicial, not statutory, doctrines of ripeness and exhaustion of administrative remedies–because the parties seeking such review were shippers who attacked specific, individual rate increases permitted by the Commission. The Railroads concede that denial of relief to the shippers in these cases was "based upon . . . the availability of further remedies,"[6] namely administrative reparation proceedings under 49 U.S.C. §§13(1), 15(1) and 16(1) which "focus[] upon individual rates."[7]

None of the cases relied upon by the Railroads involved a challenge to the Commission's procedural compliance with NEPA in preparing and circulating an impact statement on the *cumulative* environmental effects of a general rate increase covering "literally thousands of individual rates" (R.R.J.S., p. 31).[8] The court below, after careful and thorough consideration (371 F.Supp., pp. 1296-98), correctly held that even if the continued validity of these cases is assumed–a point which is in some doubt[9]–these cases are nonetheless

[6] R.R.J.S., p. 20.

[7] *Id.*

[8] As to the duty of federal agencies to assess the *cumulative* environmental effects of their proposed actions through the NEPA procedure, *see* Council on Environmental Quality, *Guidelines: Preparation of Environmental Impact Statements* (hereinafter "*CEO Guidelines*"), §§1500.6(a), (d)(1), 38 Fed. Reg. 20550 (Aug. 1, 1973); *Scientists' Institute for Public Information v. Atomic Energy Comm'n*, 481 F.2d 1079 (D.C.Cir. 1973); compare *Greene County Planning Board v. Federal Power Comm'n*, 455 F.2d 412, 421 (2d Cir. 1972), *cert. den.*, 409 U.S. 849 (1972) ("[W]e would not lightly suggest that the Council . . . has misconstrued NEPA.").

[9] *See Atlantic City Elec. Co. v. United States*, 306 F.Supp. 338 (S.D.N.Y. 1969), and *Alabama Power Co. v. United States*, 316 F.Supp. 337 (D.D.C. 1969), *both aff'd by an equally divided Court*, 400 U.S. 73 (1970).

wholly inapposite, because 49 U.S.C. § 13(1) does not provide further, unexhausted administrative remedies where, as here, the relief sought is not an alteration of one or more individual rates, but rather the specific enforcement of the Commission's procedural NEPA duties at the stage of the general revenue proceeding. A challenge to the adequacy of the Commission's analysis of cumulative environmental effects at that stage raises "far different questions," 371 F.Supp. at 1298, from those that can be raised in § 13(1) proceedings, which are available only in individual instances in which a carrier (*not* the Commission) is claimed to have violated the Interstate Commerce Act (*not* NEPA).

The court below noted that:

> "It is suggested that an environmental group, while it could not obtain reparations [in a § 13(1) proceeding], should be able to complain that a particular charge on a particular item is unreasonable because of its environmental effects. Thus if SCRAP [or EDF, *et al.*] could initiate an investigation on this theory, it could argue further that before rejecting the complaint the Commission would have to prepare an environmental impact statement [on the individual rate challenged, not on the cumulative effects of the general revenue order]. But we know of no Commission order or judicial opinion accepting this theory and it is thus too speculative and too unrealistic to support a denial of jurisdiction." 371 F.Supp. at 1297.

This questionable suggestion is not repeated in appellants' jurisdictional statements. Nor do the Railroads otherwise specify any unexhausted "further remedies" available to EDF, *et al.*, which might justify a postponement of judicial review in this case.

Thus, the Railroads seek, not a postponement of judicial review pending administrative proceedings in which relevant relief can be sought, but rather a total foreclosure of judicial review of the Commission's procedural compliance with NEPA in the course of its general revenue proceedings. This result is totally inconsistent with this Court's holdings on reviewability in cases such as *Overton Park, supra; Abbott Laboratories v. Gardner,* 387 U.S. 136, 141 (1967); *Rusk v. Cort,* 369 U.S. 367, 379-80 (1962); *Brownell v. We Shung,* 352 U.S. 180, 185 (1956); and *Marcello v. Bonds,* 349 U.S. 302, 310 (1955).[10]

Moreover, the effect of such foreclosure as to appellees EDF, *et al.*, would be:

> "significantly [to] dilute the Supreme Court's holding . . . in this case[11] that SCRAP [and EDF, *et al.*, have] full standing, equal to and not derived from the standing of economically interested parties, to seek review of Commission action which allegedly harms their members in their use of the environment,[12]

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[10]Compare *Atchison, T. & S.F.R. Co. v. Wichita Board of Trade,* 412 U.S. 800, 806 (1973), holding that a court has the "duty . . . to determine whether the course followed by the [Interstate Commerce] Commission is consistent with its mandate from Congress" even where, as in *Wichita,* the court may not be permitted to enjoin the collection of increased rates approved by the Commission. In the present case, of course, no issue is presented as to the court's power to grant such injunctive relief. Such relief was denied, 371 F.Supp. at 1307-10, and the denial is not appealed from.

[11]*United States v. SCRAP,* 412 U.S. 669, 683-90 (1973).

[12]371 F.Supp. at 1297. Compare this Court's holding in *Trafficante v. Metropolitan Life Ins. Co.,* 409 U.S. 205 (1972) that tenants have standing to attack their landlord's allegedly discriminatory rental policies, and that this standing is equal to and not derived from that of rejected applicants who might bring their own suit – as they in fact did in *Trafficante. (See* Brief of Respondent Parkmerced Corp. on the Merits, No. 71-708, p. 5.)

since it would preclude their obtaining relief for the same asserted "injury in fact" which has been held to give them standing.

2. *That the Interstate Commerce Commission has unreviewable authority to determine the adequacy of its own environmental impact statements.*

This argument takes two forms:

a. The Railroads contend (R.R.J.S., pp. 22-28) that once the Commission has produced a document of a certain length which is labelled an "environmental impact statement," and which "seems to meet the prescriptions of NEPA as to form" in the superficial sense that "it has sections, for instance, on the five considerations which NEPA requires agencies to address in their statements," 371 F.Supp. at 1301, the reviewing court is precluded from further scrutiny of the contents to determine their adequacy.

The reason advanced for this assertion is that any such scrutiny constitutes "judicial review . . . of the substantive merits of the agency's impact statement determinations," R.R.J.S., p. 22, and thus a forbidden substitution of the court's "judgment for that of the expert agency," *id.* at 18; *cf.* Gov.J.S. at 18.

The obvious flaw in this reasoning is that it denies the distinction between two very different kinds of review:

i. Judicial examination of an impact statement to determine its procedural adequacy (*e.g.*, to determine whether it adequately and accurately sets forth such information as the "alternatives to the proposed action,"[13] or the "full range of responsible opinion on

[13]See *Natural Resources Defense Council v. Morton*, 458 F.2d 827 (D.C. Cir. 1972). Obviously this is not the same question as whether it contains a section which is merely labelled "alternatives."

the environmental effects."[14]); and

ii. Judicial review of the merits of an agency's substantive action—quite apart from the procedural adequacy of its impact statement—to determine whether that action complies with the substantive environmental policies announced in NEPA.

The issues that might be raised by the latter kind of review are simply not presented by this case. Review below was expressly confined to the Commission's "efforts to comply with NEPA's *procedural* commands," which the court found "sorely deficient." 371 F.Supp. at 1299. (Emphasis added.)

The review by the court below of the Commission's impact statement was indistinguishable from the review conducted in numerous other NEPA cases[15] in which courts have recognized and accepted the duty to give a challenged impact statement meaningful examination, rather than terminating that examination on a finding of mere *pro forma* compliance.[16] Appellants have cited no case—and EDF, *et al.*, know of none— in which

[14]*Committee for Nuclear Responsibility v. Seaborg*, 463 F.2d 783, 787 (D.C.Cir. 1971); *see Silva v. Lynn*, 482 F.2d 1282 (1st Cir. 1973).

[15]See, *e.g.*, *Silva v. Lynn*, note 14, *supra*; *Monroe County Conservation Council v. Volpe*, 472 F.2d 693, 697 (2d Cir. 1972); *Natural Resources Defense Council v. Morton*, 458 F.2d 827 (D.C. Cir. 1972); *Ely v. Velde*, 451 F.2d 1130, 1138-39 (4th Cir. 1971); *Natural Resources Defense Council v. Stamm*, ___ F.Supp. ___, 6 ERC 1525 (E.D. Cal., No. S-2663, April 26, 1974); *I-291 Why? Ass'n v. Burns*, 372 F.Supp. 223, 243-62 (D.Conn. 1974); *Environmental Defense Fund v. Tennessee Valley Auth.*, 339 F.Supp. 806, 809 (E.D.Tenn. 1972).

[16]In determining an impact statement to be inadequate, the courts are not, of course, forbidden, as the Railroads suggest (R.R.J.S. pp. 27-28), to specify the nature of the inadequacy, or of the further information required to cure it. *See* cases cited, note 15, *supra*.

compliance with NEPA as to mere form was held to bar further inquiry into the adequacy of that compliance. Were such a bar to be erected, NEPA would be turned into an empty, unreviewable exercise in red tape. For practical purposes, there would be no judicial oversight of those agencies, which, in the words of Rep. John Dingell, a principal sponsor of NEPA:

> "... are complying poorly. They decide what they are going to do and then write an environmental impact statement to support the decision. That is not what Congress had in mind." *Christian Science Monitor*, Feb. 28, 1973, p. 12.

b. The Government contends (Gov.J.S., pp. 14-15) that the Commission is at liberty to bypass the impact statement procedure specifically mandated by § 102(2)(C) of NEPA if it deems that some other procedure, not sanctioned by the statute, would provide an eventual substitute for purposes of subsequent cases, although not for purposes of the present case.

The court below held that the Commission has a duty to consider the environmental impact of the underlying rate structure in preparing a § 102(2)(C) impact statement on the present across-the-board percentage increase, which necessarily accentuates pre-existing absolute differentials between rates authorized for recyclable materials and those authorized for competing virgin materials. 371 F.Supp. at 1304-05.

The Government's claim, here as below, is that if the Commission has announced that it will ultimately conduct a separate study of the overall rate structure,[17] it need not discuss the environmental impact of this

[17] It appears that the separate study here contemplated will not consider the whole of the underlying rate structure, but only parts thereof. 371 F.Supp. at 1305.

structure in its § 102(2)(C) statements on individual general rate increases, such as the present one, even though omission of such discussion vitiates these statements. 371 F.Supp. at 1305.

This argument ignores the highly specific procedural commands of § 102(2)(C) of NEPA, which require that "every" recommendation or report on a proposal for major federal action significantly affecting the environment include an impact statement; that this impact statement be made on the basis of consultation with other agencies; and that this statement accompany "the proposal" through the agency review processes.[18]

As the Court of Appeals for the District of Columbia Circuit noted in rejecting an identical argument in *Scientists' Institute for Public Information v. Atomic Energy Comm'n*, 481 F.2d 1079, 1091 (D.C.Cir. 1973):

> "to the extent that the Commission's 'environmental survey' [proposed as a substitute for an impact statement] would not be issued in accordance with NEPA's procedures for preparation and distribution, it is not an adequate substitute for a NEPA statement. *These procedural requirements* [in § 102(2)(C) of NEPA] *are not dispensable technicalities, but are crucial* if the statement is to serve its dual functions of informing Congress, the President, other concerned agencies and the public of the environmental factors at all stages of agency decision making." (Emphasis added.)[19]

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[18] *CEQ Guidelines, supra,* §1500.2. As to the rigorous, nondiscretionary nature of these requirements, *see, Calvert Cliffs' Coord. Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971), *cert. den.* 404 U.S. 942 (1972). *See also Scherr v. Volpe*, 466 F.2d 1027, 1031 (7th Cir. 1972); *Greene County Planning Board v. Federal Power Comm'n*, 455 F.2d 412 (2d Cir. 1972), *cert. den.*, 409 U.S. 849 (1972); *Ely v. Velde*, 451 F.2d 1130, 1138 (4th Cir. 1971); *Natural Resources Defense Council v. Morton*, 337 F.Supp. 170, 172 (D.D.C. 1972).

The case principally relied on by the Government for this claim, *American Lines v. Louisville & N. R. Co.*, 392 U.S. 571 (1968), does not in fact support it. *American Lines* did not authorize a departure from a specific, statutorily mandated procedural scheme. Rather it held that in the absence of such a statutory scheme the "discretion implied in the rate making power" embraced "the method used" as well as the "determination itself." 392 U.S. at 592. Clearly, though, such "implied" discretion cannot take precedence over a specific statutory command.

Acceptance of the Government's invitation to construe the statutory commands of § 102(2)(C) out of existence would negate the most fundamental policy of NEPA, namely that the environmental consequences of proposed federal action be examined *before*, rather than *after*, that action is taken.[20] Such a holding would cast in doubt the binding nature of the § 102 procedural commands not only for the Interstate Commerce Commission,[21] but also for any other agency that might be tempted to invent reasons why these commands should be judicially repealed. This invitation should be rejected.

3. *That although the "existing agency review processes" in this case included a hearing, the impact*

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[20]See *Calvert Cliffs'*, *supra*, 449 F.2d at 1112-15, notes 5-13 and accompanying text.

[21]Whose response to these commands has thus far ranged from "slow" to "combative." *Harlem Valley Transp. Ass'n v. Stafford*, ___ F.2d ___ (2d Cir. No. 73-2496, June 18, 1974) slip op. at 4278; *SCRAP v. United States*, 371 F.Supp. 1291, 1302 (D.D.C. 1974); *SCRAP v. United States*, 346 F.Supp. 189, 195, n. 8 (D.D.C. 1972); *City of New York v. United States*, 337 F.Supp. 150, 158 (E.D.N.Y. 1972).

statement need not "accompany the proposal through [these] processes" as required by §102(2)(C) of NEPA. (Gov.J.S., pp. 18-21; R.R.J.S., pp. 29-32).

Appellants contend that an oral hearing is not statutorily required in a general revenue proceeding, and that the lower court therefore erred in holding that the Commission was required to prepare an environmental impact statement prior to the hearing which the Commission—as it customarily does in general revenue proceedings—did in fact conduct.

But even if it is assumed, as EDF *et al.*, do not concede, that this hearing was not statutorily required, this assumption offers no basis for an attack on the lower court's holding. The lower court held, 371 F.Supp. at 1307, that whether such hearings are required or not, the fact that the Commission "customarily" conducts such hearings makes them a part of the "*existing* agency review processes" (emphasis added) for purposes of § 102(2)(C). (Indeed, the court found that on the facts of this case, the hearing "may well be the most important stage in the decision-making process." *Id.* at 1301.

On this basis, the court correctly held that § 102(2)(C) requires that the impact statement "accompany the proposal" through the hearing,[22] and thus that there is a "strong presumption" that "full consideration of the revised impact statement," once the Commission corrects the defects of its previous version, "must entail oral hearings before the Commission." *Id.* at 1307.

This limited holding is not seriously challenged by appellants, who focus instead on the question—not presented on these facts—of whether a hearing was required in the first place.

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[22]See *CEQ Guidelines, supra,* §1500.7(d).

This Court should not accept appellants' invitation to issue an advisory opinion on this question.

CONCLUSION

These appeals should be summarily dismissed for lack of jurisdiction. In the alternative, the decision and order of the court below should be summarily affirmed.

Respectfully submitted,

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August, 1974

AUG 2
MICHAEL RODAK,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 73-1966 and 73-1971

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.) et al., *Appellees*

ABERDEEN AND ROCKFISH RAILROAD COMPANY, et al., *Appellants*

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.) et al., *Appellees*

On Appeal from the United States District Court for the District of Columbia

MOTION TO DISMISS OR FOR SUMMARY AFFIRMANCE BY NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., COMMERCIAL METALS CO., I.V. SUTPHIN CO. AND FRANKEL BROTHERS & CO. INC.

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MOTION TO DISMISS OR FOR SUMMARY AFFIRMANCE BY NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., COMMERCIAL METALS CO., I.V. SUTPHIN CO. AND FRANKEL BROTHERS & CO. INC.

Appellees National Association of Recycling Industries, Inc. (NARI), Commercial Metals Co., I.V. Sutphin Co. and Frankel Brothers & Co. Inc. hereby

move, under and pursuant to the provisions of Rule 16 of the Supreme Court Rules—

(1) to dismiss the two appeals filed by appellants herein on the ground that this Court has no jurisdiction over such direct appeals from a District Court judgment under the provisions of Title 28 U.S.C. § 1253; or in the alternative,

(2) for summary affirmance of the District Court's judgment reported at 371 F.Supp. 1291 on the ground it is manifest that the issues now raised by appellants are not substantial and the decision and judgment of the District Court are plainly sound, reasonable and correct.

STATEMENT OF FACTS IN SUPPORT OF THE MOTION

Appellee NARI is the trade association for the nonferrous metals, waste paper, textile, plastics and rubber recycling industries. Its membership consists of approximately 700 firms located throughout the United States which collect, process and utilize for manufacturing purposes the aforementioned recyclable materials. Appellees Commercial Metals Co. of Dallas, Texas, I.V. Sutphin Co. of Cincinnati, Ohio, and Frankel Brothers & Co., Inc. of Rochester, New York, are, in turn, members of NARI and each is engaged in the recycling of solid waste materials and recovery of useful resources from discarded solid wastes which otherwise would have to be burned, buried or similarly disposed at public expense, with obvious adverse effects upon the environment.

Over the years since 1968, NARI, numerous other private recycling and environmental organizations, and various agencies of the Federal Government (includ-

ing the President's Council on Environmental Quality, the Environmental Protection Agency, the Departments of Commerce and Interior and the General Services Administration) have repeatedly petitioned the Interstate Commerce Commission *not* to license or approve any further across-the-board annual percentage increases in railroad freight rates for the transportation of recyclable materials until the Commission first takes effective action to correct the grossly discriminatory, unreasonable *base rates* charged by the railroads for such transportation, which rates have historically impeded and stifled the marketing of recyclable commodities and artificially stimulated the utilization and depletion of competing, scarce virgin natural resources, again with serious adverse effects on the environment.

The Commission and the railroads have been completely impervious to these pleas. The railroads have continued to seek and the Commission has approved, without first investigating the unlawful nature of the *base rate structure,* the following annual percentage increases in rates charged for the transportation of recyclable commodities:

ICC Case No.	Year	Increase In Waste Paper Rates	Increase In Non-Ferrous Metal Scrap Rates
Ex Parte 256	1967	3%	3%
Ex Parte 259	1968	5%	5%
Ex Parte 262	1969	6%	6%
Ex Parte 265	1970	6%	6%
Ex Parte 267	1971	11%	11%
Ex Parte 281	1972	2.5% surcharge plus 3%	2.5% surcharge plus 3%

The evidence developed in this case, however, now demonstrates clearly that, as repeatedly asserted by

NARI and the others mentioned above, these constant annual rate increases have been extremely damaging to the pre-existing discriminatory rate structure in that they have operated substantially to broaden the *net disparity* in rates which already existed between those charged by the railroads for the transportation of recyclable commodities and those simultaneously charged for the transportation of competing virgin materials. That evidence, obtained from the Interstate Commerce Commission itself, shows:[1]

(1) That during the period from 1959 through 1971, the *net disparity* in *average rates* charged for the transportation of competing *woodpulp* and *waste paper* grew from 13.9¢ per hundred pounds to 18.6¢ per hundred pounds, the *actual average rates* charged per hundredweight being as follows:

Year	Woodpulp	Waste Paper
1959	17.4¢	31.3¢
1971	24.4¢	43.0¢

(2) That during the same period (1959-1971), the *net disparity* in *average rates* charged for the transportation of competing *non-ferrous metal virgin ores and concentrates* and *non-ferrous metal scrap* grew from 13.3¢ per hundred pounds to 17.7¢, the *actual rates* per hundredweight being as follows:

Year	Virgin Ores	Scrap Metal
1959	51.7¢	65.1¢
1971	70.3¢	88.0¢

In 1966, while the railroads and the Commission were proceeding in the manner just described, Congress passed the National Environmental Policy Act (42

[1] See Commission's Environmental Impact Statement, *Ex Parte 281*, pgs. 84, 85.

U.S.C. § 4321 et seq.). That statute states, at 42 U.S.C. § 4331(b):

> "(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may— . . . .
>
> (6) *enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.*" (Emphasis supplied.)

Section 102 of NEPA (42 U.S.C. § 4332) thereupon provides:

> "The Congress authorizes and directs that, to the fullest extent possible:
>
> "(1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and
>
> "(2) all agencies of the Federal Government shall— . . .
>
> "(C) include in every recommendation or report on . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

"Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to the environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public . . . and shall accompany the proposal through the existing agency review processes."

Shortly after NEPA became effective, therefore, parties appearing before the Commission in important railroad cases contended that the Commission could no longer completely ignore relevant environmental considerations in its decision-making process, and that henceforth its major actions necessarily had to be supported by Environmental Impact Statements prepared as directed by NEPA. The Commission, however, exhibited almost complete disdain for the new federal statute, and as early as 1971, it sought to intervene in *Greene County Board* v. *Federal Power Commission,* C.C.A. 2, 1971, 455 F.2d 412, cert. denied 409 U.S. 849—a case wherein the Federal Power Commission was seeking to avoid regulatory agency compliance with NEPA. ICC's intervention was rejected, however; the

Second Circuit ruled against FPC's position, and this Court denied certiorari.

In *City of New York* v. *United States,* 337 F. Supp. 150 (D.C., N.Y. 1972), a case involving proceedings before the Interstate Commerce Commission itself, the Commission directly defied NEPA and endeavored to license the abandonment of railroad facilities without the preparation of a supporting Environmental Impact Statement. A Three-Judge Court in New York criticized the Commission for its "slow reaction" to the directives of NEPA and stated that the Commission was powerless to "disregard . . . the law" (337 F. Supp. 158-160). The Court remanded the case to the Commission, stating, at 337 F. Supp. 160:

> "To permit an agency to ignore its duties under NEPA with impunity because we have serious doubts that its ultimate decision will be affected by compliance would subvert the very purpose of the Act and encourage further administrative laxity in this area. . . . In any event, preservation of the integrity of NEPA necessitates that the Commission be required to follow the steps set forth in § 102, even if it seems likely that those steps will lead it to adhere to the present result. Thus, this proceeding must be remanded to the Commission for it to bring itself into compliance with the law."

Albeit the District Court's decision in *City of New York, supra,* was rendered on January 20, 1972, the Commission nevertheless proceeded 12 days later (on February 1, 1972) in the case at bar *(Ex Parte No. 281, Increased Freight Rates, 1972)* to license another increase in rates for the transportation of recyclables *without preparing any Environmental Impact Statement under NEPA.* The Commission instead relied

on the same type of terse, unsupported conclusion it made in *City of New York, supra,* to wit, that, in the Commission's opinion, the challenged rate increase *"would have no significant adverse effect . . . on the quality of the human environment within the meaning of NEPA"* (See 341 I.C.C. 288, 314). On April 24, 1972, that rate increase was extended in duration, again without any effort on the part of the Commission to comply with NEPA.

The Commission's continued defiance of the law in *Ex Parte 281* thus led to the commencement of this action by the original plaintiffs S.C.R.A.P. Faced with this litigation, the Commission suddenly promised both the District Court and the Chief Justice of this Court that it intended to comply with all of the requirements of NEPA before it issued its final report in *Ex Parte 281* with reference to the allowance of permanent rate increases for 1972 (See *S.C.R.A.P.* v. *United States,* 346 F.Supp. 189, 198). Thereafter, however, the Commission flatly ignored those promises, and when it rendered its final report on October 4, 1972, it supplied no supporting Impact Statement under NEPA. Once again, it retreated to its old rejected, unsustainable *City of New York* position by stating (341 I.C.C. 288, 314):

> "Inasmuch as we conclude that our actions herein will neither actually nor potentially significantly affect the quality of the human environment, we have *not* included in our Report an extensive formal impact statement."

In the meantime, in still another case simultaneously pending in the United States District Court for the Southern District of New York *(Harlem Valley Trans-*

portation Association v. *Stafford, Chairman, Interstate Commerce Commission),* the Commission was contending, *this time directly contrary to the position taken by the Department of Justice in the same case,* that it had no obligation to prepare any Impact Statements under NEPA until it reached its final decisions in cases, i.e., the Commission had no duty under NEPA to prepare draft Impact Statements at earlier stages of Commission proceedings. That contention was bluntly rejected by the District Court on June 21, 1973, and its decision was affirmed by the Court of Appeals for the Second Circuit on June 18, 1974 (See *Harlem Valley Transportation Association, et al.* v. *Stafford, Chairman, Interstate Commerce Commission,* C.C.A. 2, Docket No. 73-2496, decision rendered 6/18/74). In its opinion, the Second Circuit stated:

> ". . . (W)hile we recognize there are limits to what may reasonably be expected from agency compliance with NEPA, we cannot excuse . . . noncompliance with NEPA such as the ICC here seeks to justify."

In the case at bar, when the Commission once again failed to support its Final Report in *Ex Parte 281* with any Environmental Impact Statement under NEPA, protesting petitions were filed with the Commission by the Council on Environmental Quality, the Environmental Protection Agency, appellees NARI et al. and others (See 353 F. Supp. 320, 321). Plaintiffs S.C.R.A.P. went further and filed a motion for injunctive relief with the District Court in this action. At that point, the Commission suspended its Final Report and Order of October 4, 1972 in *Ex Parte 281* as they applied to recyclable commodities until it could further evaluate the situation under NEPA.

It was therefore with this background of arbitrary, capricious resistance and opposition to all of the basic requirements of NEPA coupled with its deaf refusal to respond in any way to the persistent pleas it had repeatedly received over the years *not* to license any further increases in rates for the transportation of recyclable commodities until it first eliminated the basic rate discriminations involved, that the Commission belatedly set out to prepare an Environmental Impact Statement which might somehow be construed as sufficient to support the groundless conclusions it had already reached and expressed in its suspended Final Report in *Ex Parte 281.*

Appellee NARI, cognizant of that background and fearful of the Commission's true motives, promptly asked the Commission whether it intended to hold a hearing on the environmental aspects of this case before it issued any further statements in this matter under NEPA. In this regard, in *City of New York* v. *United States, supra,* when the Commission was ordered by a District Court to comply with NEPA, the Commission, upon remand, immediately scheduled a hearing at which "All parties were given full opportunity to present expert evidence on the environmental aspects of the case" (See 344 F.Supp. 929, 938). But here, the Commission summarily rejected NARI's request for a hearing, stating the Commission intended to proceed entirely *ex parte.*

It was thus hardly surprising that soon thereafter, on March 5, 1973, the Commission issued a draft Environmental Impact Statement in this case which both the Council on Environmental Quality and the Environmental Protection Agency and others labeled totally "inadequate" and otherwise violative of NEPA.

The Commission, plainly accustomed to such low grades under NEPA, nevertheless issued the said Impact Statement in final form on May 2, 1973, over the vigorous dissent of two of its own Commissioners and the abstention of a third.

The Commission thereupon reinstated its original Final Report in *Ex Parte 281* and licensed still another 3% permanent increase in freight rates for recyclable commodities. This sixth successive increase since 1968 imposed another $9,600,000 a year in unlawful, grossly discriminatory freight rates upon the recycling industry, without any effort on the part of the Commission to investigate and correct the discriminatory nature of the aggravated base rate structure.

Appellees promptly filed motions for summary judgment and appropriate injunctive relief in the District Court. On February 19, 1974, the Three-Judge Court ruled that *"the Commission's efforts to meet the commands of NEPA were substantially deficient."* The case was thus *remanded* to the Commission *"for fulfillment of its NEPA obligations"* (371 F. Supp. 1291).

The District Court, however, *refused to grant any injunctive relief,* stating:

> "However, because of our uncertainty concerning the meaning of the Supreme Court's decision last term in *Atchison, Topeka & Santa Fe R. Co.* v. *Wichita Board of Trade,* 412 U.S. 800, 93 S. Ct. 2367, 37 L. Ed. 2d 350 (1973), we refrain from issuing an injunction restraining the railroads from collecting the increased rates pending the Commission's reconsideration."

ARGUMENT

I.

This Court Lacks Jurisdiction Over Appellants' Direct Appeals Under 12 U.S.C. § 1253

Both Government appellants and railroad appellants rely exclusively on 28 U.S.C. § 1253 to support their direct appeals to this Court from the District Court's judgment of February 19, 1974.[2] But 28 U.S.C. § 1253 allows direct appeals to this Court *only* from judgments *"granting or denying . . . an interlocutory or permanent injunction."*

These two appeals, however, are not appeals "from an order granting or denying . . . an . . . injunction." While the District Court did deny an injunction which had been sought by appellees (371 F. Supp. 1307-10), *appellees have not perfected appeals from that denial.*

Appellants, on the other hand, having clearly prevailed on the injunction issue below so that the railroads are *still* collecting the new rate increase of $9,600,000 a year authorized by the Commission, have no standing to appeal from that massive victory (*Public Service Commission of Missouri* v. *Brashear Freight Lines, Inc.*, 306 U.S. 204, 59 S. Ct. 480, 83 L.Ed. 608 (1939); *Gunn* v. *University Committee To End The War*, 399 U.S. 383, 391, 90 S.Ct. 2013 (1970); *Rockefeller* v. *Catholic Medical Center*, 397 U.S. 820, 90 S.Ct. 1517, 25 L.Ed.2d 806 (1970). Indeed, the District Court expressly ruled at 371 F.Supp. 1291, 1293:

> ". . . (W)e refrain from issuing an injunction restraining the railroads from collecting the in-

[2] Government's Jurisdictional Statement, p. 2; Railroads' Jurisdictional Statement, p. 2.

creased rates pending the Commission's reconsideration."

Patently therefore both direct appeals to this Court must be dismissed for lack of jurisdiction under 28 U.S.C. § 1253 (*Public Service Commission* v. *Brashear, supra; Hutcherson* v. *Lchtin,* 399 U.S. 522, 90 S.Ct. 2238 (1970); *Rockefeller* v. *Catholic Medical Center, supra).*

The two cases upon which appellants rely to support their jurisdictional claims are plainly inapposite because both involved appeals from orders "granting or denying . . . an . . . injunction." *Baltimore & O.R.R.* v. *U.S.,* 386 U.S. 372 (1967) involved an appeal by losing parties who had sought an injunction which was denied by the court below. *United States* v. *Allegheny-Ludlum Steel Corp.,* 406 U.S. 742 (1972), in turn, involved two cases, one in which an appealing party requested injunctive relief that was denied, and the other in which the Interstate Commerce Commission had opposed an injunction that was granted by the District Court.

II.

The District Court's Judgment Should Be Affirmed or the Appeals Should Be Dismissed Because the Issues Presented for Review Are Not Substantial.

In addition to the fatal jurisdictional barrier discussed hereinabove, the instant motion should be granted because the two appeals do not present substantial questions for review by this Court.

Essentially, the only real question again presented by appeallants is whether the Interstate Commerce Commission, like all other federal agencies, is subject to the National Environmental Policy Act, 42 U.S.C.

4321 et seq., so that it must follow the procedures prescribed by that federal statute and thus fairly develop and prepare environmental impact statements to support its major federal actions.

Clearly, this same basic question, raised time after time in the past, has already been firmly resolved against appellants by the decisions in *Greene County Board* v. *Federal Power Commission*, 455 F.2d 412 (2d Cir.), cert. denied 409 U.S. 849; *City of New York* v. *United States*, 337 F.Supp. 150 (S.D.N.Y., 1972); and *Harlem Valley Transportation Association* v. *Stafford, Chairman, Interstate Commerce Commission*, 2d Cir., June 18, 1974, Docket No. 73-2496).

The correctness of these recent decisions is not subject to doubt. As this Court recognized in *United States* v. *S.C.R.A.P.*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973), the "policies and goals set forth in [NEPA] are supplementary to those set forth in existing authorizations of Federal agencies" (See 93 S.Ct. 2419; 42 U.S.C. § 4335); and Congress specifically directed all federal agencies, with no exemption of the Interstate Commerce Commission, to take all actions necessary to conform their existing authority and administrative procedures to the requirements of NEPA (See 42 U.S.C. § 4333). Thus, this Court readily assumed in *S.C.R.A.P.* that *"there is general judicial power to determine if an agency has complied with NEPA, and to grant equitable relief if it has not"* (See 93 S.Ct. 2420).

And, of course, this is precisely what the District Court has now done in the case at bar. It exercised its "general judicial power to determine if the [ICC] has complied with NEPA," and when it found that the

Commission had *not* correctly complied, is simply remanded the case to the Commission for further proceedings consistent with the requirements of NEPA (See *S.C.R.A.P.* v. *United States,* 371 F. Supp. 1291 (1974)).

In line with the holding in *Calvert Cliffs Coordinating Committee* v. *Atomic Energy Commission,* 146 U.S. App. D.C. 33, 38, 449 F.2d 1109, 1114 (1971), the District Court ruled that NEPA "sets a high standard for the agencies, a standard which must be vigorously enforced by the reviewing courts." It also held, consistent with *Greene County Board* and *Calvert Cliffs, supra,* that the ICC, like other federal agencies, must meet the procedural requirements of NEPA "fully and in good faith," and its environmental impact statement cannot be prepared in an arbitrary, capricious manner, and it cannot be sustained if it patently gives insufficient weight and attention to environmental values (See 146 U.S.App.D.C. at 39, 449 F.2d at 1115).

The District Court carefully restricted its review of the Commission's impact statement to matters of *procedure* under NEPA and it expressly avoided "any substantive review," albeit federal courts in other circuits previously extended their review of NEPA impact statements to matters of *substance* (See *Conservation Council of North Carolina* v. *Froehlke,* 4 Cir., 473 F.2d 664, 665 (1973); *Environmental Defense Fund Inc.* v. *Froehlke,* 8 Cir., 473 F.2d 346, 353 (1972)).

In essence, therefore, the District Court found that in this case the Commission, which initially doggedly refused to comply with NEPA at all, was now guilty of mere *pro forma* compliance (See *App. A, Govt's J.S., pg. 28a*); that, contrary to *Greene County Board* and

Calvert Cliffs, supra, the Commission's impact statement is "deficient"; it does not contain "individualized good faith consideration and balancing of environmental factors"; it is combative, defensive and advocatory"; and does not respond in any respect to suggestions and recommendations made in good faith by other federal agencies (See *App. A, Govt's J.S., pgs. 28a-39a*).

Moreover, the District Court found that the Commission arbitrarily and capriciously failed to give any consideration whatsoever to the *discriminatory, debilitating underlying rate structure* before it prepared and finally adopted its *pro forma* impact statement under NEPA. In this connection, the District Court stated (See *App. A, Govt's J.S., pgs. 34a-39a*):

> "It is the underlying rate structure which the percentage increases aggravate; if this structure contributes to the degradation of our environment, then the increases would at least presumptively aggravate that contribution. . . . The Commission's failure to hold down the rate increases on recyclables would thus have a cumulative impact on the environment. Such cumulative impacts must be considered in NEPA statements. . . .
>
> "The necessity for the Commission to consider the environmental impact of the underlying rate structure before approving rate increases on recyclable commodities is further underscored by the recent enactment of Public Law 93-236, 93rd Congress, the Regional Rail Reorganization Act of 1973. Section 603 of the Act requires the Commission to 'adopt appropriate rules' to 'eliminate discrimination against the shipment of recyclable materials in rate structures . . . where such discrimination exists.' This provision is a legislative recognition of discrimination against recyclables in the existing railroad rate structure and a legis-

> lative direction to the Commission to eliminate it. The responsibility imposed by NEPA upon the commission to 'approach the maximum attainable recycling of depletable resources,' 42 U.S.C. § 4331(b)(6), surely cannot be fulfilled unless this provision is complied with before rate increases on recyclable commodities are approved."

Thus, the District Court acted properly and correctly when it rejected the Commission's *pro forma*, arbitrary, incomplete environmental impact statement, and when it simply remanded this case to the Commission for further administrative proceedings consistent with the requirements of NEPA and Section 603 of Public Law 93-236, referred to in the last mentioned excerpt from the District Court's opinion.

Plainly, therefore, there is absolutely no substance to the railroads' contention that the "lower court had no authority to act in this case." There is nothing whatever in the Interstate Commerce Act or any other statute which prevents judicial review of a federal agency's compliance or non-compliance with NEPA. Indeed, as stated above, this Court indicated in *United States* v. *S.C.R.A.P., supra,* that "there is general judicial power to determine if an agency has complied with NEPA, and to grant equitable relief if it has not" (See 93 S.Ct. 2420).

Nor is there any validity to the Government's hollow contention that the District Court's decision somehow "denies the railroads the benefit of timely general revenue orders." In the case at bar, the District Court denied injunctive relief *and expressly allowed the railroads to go ahead with the collection of the challenged rate increases while the Commission reconsiders the case under NEPA.* If the Commission *now* comes to grips *in this case* with the discriminatory nature of the

underlying base rate structure, there will be no delays in future cases because all of the relevant facts will have been developed here, for use by the Commission and the parties, in this case and in all future rate proceedings. Thus, in the final analysis, the District Court's order to the Commission in this case will actually resolve that issue once and for all, and will thus result in substantial time savings in future rate increase proceedings.

Finally, the Government's hearing contentions are completely specious. In *City of New York, supra*, the Interstate Commerce Commission, on its own motion, expeditiously held a full hearing to develop the facts it and the parties there involved deemed necessary for inclusion in a NEPA statement *after* the Commission was firmly ordered by the court in that case to comply with NEPA. Also, the Commission regularly holds hearings in rate increase proceedings under Section 15(7) of the Interstate Commerce Act, so there is nothing strange or unusual about the District Court's hearing directive to the Commission in the instant Section 15(7) case. Finally, this Court denied certiorari in *Green County Board, supra*, where the Second Circuit ruled, at 455 F.2d 422, just as the District Court has now done in the case at bar:

> "... [W]e conclude that the Commission was in violation of NEPA by conducting hearings prior to the preparation by its staff of its own impact statement...
>
> "... [T]he [impact] statement may well go to waste unless it is subject to the full scrutiny of the hearing process...."

CONCLUSION

The motion to dismiss or affirm should be granted.

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APPELLANTS' REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

ABERDEEN AND ROCKFISH RAILROAD COMPANY, *et al.*,
Appellants,

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY OF THE ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL.

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IN THE

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY OF THE ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL.

1. In opposing the appeals taken by the railroads (No. 73-1966) and the Government (No. 73-1971), the main contention of each of the three sets of appellees is that this Court lacks jurisdiction to entertain direct appeals from the order entered by the three-judge district court.[1] Appellees' legal position is directly con-

[1] See motion to dismiss or affirm of EDF *et al.*, pp. 2-6; motion to dismiss or for summary affirmance of NARI *et al.*, pp. 12-13; and motion to dismiss of ISIS, pp. 2-3.

trary to decades of settled practice under the statutes here involved, and it is squarely refuted by the legislative history of the relevant statutes which is nowhere mentioned in appellees' motions. Indeed, as we show below, only a few years ago this Court considered and appears to have unanimously rejected the purported legal distinction that is the basis of the appellees' jurisdictional argument here.

It is beyond dispute that, under the governing statutory provisions, an order of a district court "enjoining" an ICC order (other than an ICC order for the payment of money) can be issued only by a district court of three judges [2] and such a district court order is directly appealable to this Court.[3] In this case a three-judge district court entered an order setting aside two ICC orders, stating expressly that the two orders were "vacated" (Gov. J.S. 2b), and the Government and the railroads filed direct appeals to this Court. Thus, the gist of the appellees' motions is that, while a district court order enjoining an ICC order must

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[2] Under 28 U.S.C. § 2321, the provisions of 28 U.S.C. §§ 2322-25 govern all district court actions "to enforce, suspend, enjoin, annul or set aside in whole or in part any order" of the ICC; the only exception, which is not here relevant, is for ICC orders for the payment of money, including fines, penalties or forfeitures. Section 2325 provides that "[a]n interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order" of the ICC shall not be granted "unless the application therefor is heard and determined by a district court of three judges . . . ."

[3] Under 28 U.S.C. § 1253, except as otherwise provided by law, any party may appeal to this Court "from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by an Act of Congress to be heard and determined by a district court of three judges."

be heard by a three-judge district court and is directly appealable here, an order of a three-judge district court which sets aside an ICC order is distinguishable and is not subject to direct appeal in this Court.

The legislative history of the pertinent statutory provisions, buttressed by years of consistent practice in this Court, refutes any such attempted distinction: that history shows that Congress intended from the outset that orders of the ICC would be reviewable by three-judge district courts and that orders of such courts invalidating (or refusing to invalidate) the ICC's orders would be subject to direct appeal to this Court. Moreover, Congress intended these requirements to apply whenever direct review of ICC orders was sought and without regard to whether the district court's own order was styled as an order enjoining the agency's order, setting it aside, or invalidating it in any other equivalent terms. For years, these premises have been accepted as settled by this Court, by commentators, by Congress and by the ICC itself.

As described more fully below, the requirement of a three-judge district court and direct Supreme Court review in actions seeking review of ICC orders—including actions to "set aside" such orders—originated in 1913 and has been maintained to the present time. In any number of cases, this Court has considered direct appeals from three-judge district courts in actions described by this Court as ones to "set aside" ICC orders. *E.g., Chicago, M., St. P. & P. R.R.* v. *United States,* 366 U.S. 745, 746 (1961); *Schaffer Transp. Co.* v. *United States,* 355 U.S. 83, 87 (1957). A leading treatise writer on federal practice has summarized the law by describing, as a paradigm case appropriate for a three-judge court, "a suit to set

aside an Interstate Commerce Commission order." C. Wright, *Federal Courts* 191 (2d ed. 1970). See also Burstein, "Judicial Review of ICC Orders," 38 *ICC Prac. J.* 174, 181 (1971).

In recent hearings on a bill proposing to transfer review of ICC orders to the courts of appeals, the author of the bill, Senator Hruska, said that "[a]t present, the judicial review of Interstate Commerce Commission orders is under the jurisdiction of three-judge district courts" and "[t]he decisions of such courts are reviewable in the Supreme Court by appeal." The Deputy Assistant Attorney General in charge of the Antitrust Division (which ordinarily represents the United States, the statutory defendant in ICC review proceedings), said that "[s]ince the adoption of the Urgent Deficiencies Act of 1913, orders of the Commission, except those for the payment of money, have been reviewed in the U.S. district courts by panels of three judges . . . . Appeals from these statutory three-judge district courts lie directly to the Supreme Court and are a matter of right." The Chairman of the ICC in his prepared statement said that "[j]udicial review of orders of the Interstate Commerce Commission . . . is by a U.S. District Court of three judges . . . with the decisions of these three-judge courts reviewable in the Supreme Court by appeal. . . ."[4]

Legislative history squarely confirms this generally accepted construction of the law. The Hepburn Act

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[4] *Hearing on S. 3597 before the Subcommittee on Improvements in Judicial Machinery of the Senate Judiciary Committee*, 91st Cong., 2d Sess. 1, 3, 17 (1970). See also *id.* at 27 (American Bar Association), 29 (Association of American Railroads), 32 (Motor Carrier Lawyers Association), 35 (Chief Judge Phillips of the Sixth Circuit), 35 (Association of ICC Practitioners), 36 (National Industrial Traffic League), 38 (American Trucking Associations).

of 1906 made ICC orders self-executing, and accordingly provided for judicial review of the orders. 34 Stat. 589, 592. At this time, there already existed the Expediting Act of 1903 (32 Stat. 823) which established jurisdiction and procedures by which a circuit court of three judges heard certain types of antitrust cases and appeals were taken directly to the Supreme Court. This three-judge court procedure, with direct appeal to the Supreme Court, was made applicable by the Hepburn Act to actions to "enjoin, set aside, annul or suspend any order or requirement of the Commission . . . ." 34 Stat. 592. Thus, the convocation of a three-judge court and direct review of its decision in this Court was not dependent on a request for injunctive relief. The three-judge court and direct review procedures in ICC cases originated independently of the procedures for three-judge courts and direct Supreme Court review in suits to enjoin the enforcement of statutes alleged to be unconstitutional, which did not develop until 1910. 36 Stat. 557.

After the brief experiment with review of ICC orders by the Commerce Court, constituted especially for that purpose (36 Stat. 539), the Urgent Deficiencies Act of 1913 (38 Stat. 208, 219) reinstituted review by three-judge courts. The Urgent Deficiencies Act provided in relevant part as follows:

> "No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be

> heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. . . . An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; *and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply.* A final judgment or decree of the district court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases." 38 Stat. 220 (emphasis supplied).

Plainly, under this language a suit such as the present one, which resulted in setting aside orders of the ICC, would require a three-judge district court and the district court's order granting or denying relief would be subject to direct review in this Court. As shown below, Congress has never indicated any intent to change the substance of the Urgent Deficiencies Act on this issue despite rephrasing of its language in the course of codification.

The Urgent Deficiencies Act not only demonstrates Congress' intent under that statute that three judges preside over actions to set aside ICC orders and that their grant or denial of such relief be directly reviewable in this Court, but also that Congress did not re-

gard enjoining ICC orders and setting them aside as separate concepts. Thus, the first sentence of that statute quoted above contemplated that three judges might grant an "interlocutory injunction . . . setting aside" an ICC order. Such an injunction might itself be an incident of a suit to "set aside" finally the ICC order, for which three judges were again required. In *Ayrshire Collieries Corp.* v. *United States,* 331 U.S. 132, 141 (1947), this Court confirmed that to enjoin and set aside ICC orders were essentially interchangeable concepts; there it described the final hearing clause of the Urgent Deficiencies Act—which in terms refers to "any suit brought to suspend or set aside" an ICC order—as embracing any suit "brought to enjoin the enforcement of a Commission order."

The Urgent Deficiencies Act provisions here involved remained in effect from 1913 to 1948.[5] In 1948, as part of the revision of Title 28 and its enactment into positive law (62 Stat. 869), the Urgent Deficiencies Act provisions were revised, but no intent whatever appears to alter their meaning, scope and purpose so far as concerns the three-judge court requirement for review of ICC orders and the provision for direct review in this Court. As a result of the revision, whose pertinent language remains unchanged today, Section 2321 of Title 28 provided that the procedure in district courts in "actions to enforce, suspend, enjoin, annul or set aside in whole or in part" any ICC order except orders for payment of money, fines, penalties or forfeitures "shall be as provided in this chapter." Sec-

[5] In the intervening period the provisions were incorporated, without relevant change in language, into the various codifications of Title 28 which were not, in any event, positive law. *E.g.,* 28 U.S.C. §§ 47, 47a (1940).

tion 2325, the final section in the "chapter" referred to in Section 2321, required three judges for "interlocutory or permanent injunctions restraining the enforcement, operation or execution, in whole or in part, of any order" of the ICC. Section 1253 consolidated provisions for direct appeals from three-judge district courts by providing that orders of such courts granting or denying interlocutory or permanent injunctions were subject to direct review in this Court.

As appellees in this case seek to read the 1948 revision, Congress would for the first time have introduced a subtle and pointless distinction between actions to enjoin ICC orders and all other actions seeking directly to invalidate such orders.[6] While an action to "suspend" or to "annul" or to "set aside" an ICC order would be subject to the requirement of the chapter that the action be brought against the United States (Section 2322), to the provision of the chapter governing intervention by the ICC and other parties (Section 2323), and to the provision granting the reviewing court stay powers (Section 2324), only an action to "enjoin" an order would be heard and determined by a court of three judges under Section 2325 or would be subject to direct appeal to this Court under Section 1253.

The legislative history of the 1948 revision which produced Section 2325 and Section 1253 makes it patent that no such drastic change was ever contemplated either by the revisers or by Congress. The reviser's note to Section 2325 discloses *inter alia* that it derived from "title 28, U.S.C., 1940 ed., § 47, (Oct.

[6] There is certainly no difference in practical effect between enjoining an ICC order and setting it aside. In both cases, the result is that on judicial review the order has been invalidated.

22, 1913, ch. 32, 38 Stat. 220)," which is the Urgent Deficiencies Act,[7] and that the provision for direct appeal to the Supreme Court in three-judge cases was located in Sections 1253 and 2101 (which fixes the time for appeal). The reviser's note to Section 1253 states pertinently that "[t]his section consolidates the provisions of sections 47, 47a, 380, and 380a of title 28, U.S.C., 1940 ed., relating to direct appeals from decisions of three-judge courts involving orders of the Interstate Commerce Commission or holding State or Federal laws repugnant to the Constitution of the United States." Nothing in the reviser's notes shows any intent whatever to vary the scope of cases involving ICC orders to which the three-judge requirement or direct appeal provisions apply.

The reviser's notes are authoritative in the construction of the 1948 revision.[8] Accordingly, the construction here of Sections 2325 and 1253 is governed by the long-standing principle of *United States* v. *Ryder,* 110 U.S. 729, 740 (1884), that "[i]t will not be inferred that the legislature, in revising and consolidating the laws, intended to change their policy, unless such intention be clearly expressed." The chief reviser of the 1948 revision of Title 28 confirmed that this principle expressed the intention of the revisers, stating: "Because of the necessity of consolidating, simplifying

[7] The reviser's note stated both that Section 2325 was based on Section 47 and that it was based on the first sentence of Section 47. The first sentence of Section 47 related only to interlocutory relief while Section 2325 explicitly covers both interlocutory and permanent relief. The reviser's reference to the first sentence of Section 47 can reasonably be understood to mean that certain language from that sentence was utilized in phrasing Section 2325.

[8] *United States* v. *National City Lines,* 337 U.S. 78, 81, 82 (1949); *Stainback* v. *Mo Hock Ke Lok Po,* 336 U.S. 368, 376 n.12 (1949).

and clarifying numerous component statutory enactments no changes of law or policy will be presumed from changes of language in revision unless an intent to make such changes is clearly expressed."[9]

The magnitude of the change that would be worked by reading Sections 2325 and 1253 as inapplicable to actions to set aside ICC orders is itself the surest proof that no such change was intended *sub silentio* by the revisers or by Congress. Virtually every case seeking to enjoin an ICC order could as readily be cast as a suit to set it aside and brought before a single judge no matter how critically important the order. Indeed, if the Urgent Deficiencies Act as well as Section 2325 were to be read in wholly mechanical fashion, the change effected by the new section would be 180 degrees: for, in terms, the Urgent Deficiencies Act applied the three-judge requirement to final hearings of actions to "suspend or set aside" ICC orders and *not* to actions to enjoin such orders.[10]

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[9] W. Barron, "The Judicial Code—1948 Revision," 8 F.R.D. 439, 445 (1949). Barron cited *Ryder* and numerous subsequent decisions of this Court to the same effect. *Id.* at 446-48. Accord, *Gulf R. & D. Co.* v. *Schlumberger Well Sur. Corp.*, 92 F. Supp. 16, 18 (S.D. Cal. 1950) (quoting Barron).

[10] Were Section 2325 now construed so literally as to allow a single judge to decide actions to set aside ICC orders, at least one other anomaly would arise so odd and contrary to history as to preclude this construction. Section 2324 empowers the reviewing court to "restrain or suspend . . . the operation of" the ICC order under review pending a final determination; and under any construction of Section 2325, its requirement of three judges for an "interlocutory . . . injunction . . . restraining the . . . operation" of an ICC order would apply to such a temporary restraint or suspension. The strange consequence would be that in an action to set aside an ICC order, *pendente lite* relief could be granted only by three judges but ultimate relief could be granted by a single judge.

The review of the generality of ICC orders by one-judge district courts would also be contrary to the long-established Congressional policy reflected in the Urgent Deficiencies Act. By providing for three-judge review followed by direct appeal, "Congress sought to guard against ill-considered action by a single judge and to avert delays ordinarily incident to litigation," in cases having the public importance and widespread effect of non-money ICC orders. See *United States* v. *Griffin*, 303 U.S. 226, 233 (1938). Use of one-judge district courts to review ICC orders has always been narrowly limited, principally to cases involving review of money orders. Indeed, the courts have been alert to insure that actions which in substance seek to set aside non-money ICC orders are heard in three-judge courts, even though the complaining parties otherwise described their actions.[11]

Given the uniform practices of courts and the unvarying policy of Congress to maintain three-judge review of ICC orders and direct appeals to this Court during the many years prior to the 1948 revision of Title 28, it would be bizarre indeed to conceive that the revisers, without any mention of the point or the barest notice to Congress, intended to curtail drastically this procedure. Moreover, as noted at the outset of this discussion, in the 26 years since 1948 this Court, lower courts, commentators, legislators and lawyers have all continued to regard the pertinent law

[11] Thus, three judges are required in actions brought to enjoin private parties from conduct directed or authorized in ICC orders where indirectly these actions impeach the Commission's orders. See *Lambert Co.* v. *Baltimore & O. R.R.*, 258 U.S. 377, 381-82 (1922); *Venner* v. *Michigan Central R.R.*, 271 U.S. 127, 130 (1926); *United States* v. *Railway Express Agency*, 101 F. Supp. 1008, 1012 (D. Del. 1951).

as unchanged. Even the recent consideration in Congress of bills to alter the governing statute, in a way that would retain three-judge review of ICC orders, but eliminate certain inconveniences by transferring review to the courts of appeals, has proceeded on the assumption that at present actions to set aside ICC orders are reviewable in three-judge district courts followed by direct review in this Court. See p. 4, above.

Finally, it appears that this Court only recently determined, in the course of deciding *Electronic Industries Ass'n* v. *United States,* 401 U.S. 967 (1971), that there was no jurisdictional difference between an action to enjoin and an action to set aside an ICC order, so that a decision by a three-judge district court setting aside or refusing to set aside an ICC order is directly reviewable in this Court, however the district court's order may be couched. The *Electronic Industries* case was pending here when this Court by a four-to-four vote affirmed decisions of two three-judge district courts that ICC general revenue orders are not reviewable, even where the attacks are directed to the ICC's general revenue findings and not to the increases on particular classes of rates.[12] *Electronic Industries* also involved attacks on the same general revenue orders involved in the other two cases, but unlike those two cases, the attacks in *Electronic Industries* were clearly and exclusively directed not to the general revenue findings but to the rate increases on particular groups of commodities,

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[12] *Atlantic City Elec. Co.* v. *United States,* 306 F. Supp. 338 (S.D.N.Y. 1969), and *Alabama Power Co.* v. *United States,* 316 F. Supp. 337 (D.D.C. 1970), *both aff'd by an equally divided Court,* 400 U.S. 73 (1970).

i.e., certain radio, television and other electronic components or accessories. 310 F. Supp. at 1287.

After the first two decisions were affirmed by an equally divided Court, this Court turned to the *Electronic Industries* case and directed the parties to submit supplemental memoranda on two further, related questions that are pertinent here.[13] In substance, these questions posed the issue whether a suit to enjoin ICC orders is precluded by the availability of a suit to set them aside and, if so, whether the latter suit would have to be tried to a three-judge district court. If both questions were resolved in the affirmative, this might have led this Court to remand the appeal on the grounds the suit should have been brought before a one-judge court with review in the court of appeals.

All the parties to the case—the appellant Electronic Industries Association, the United States and the ICC, and the railroads—submitted memoranda agreeing that the questions had to be answered in the negative. Setting forth the legislative history which is repeated above, the memoranda concluded that there was no pertinent distinction between actions to enjoin and actions to set aside ICC orders and that such actions

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[13] The questions, posed by letters from the Clerk to the parties on January 21, 1971, were as follows:

> "In light of 49 U.S.C. § 15(2), 28 U.S.C. §§ 2321-2325, Fed. Rule Civ. Proc. 62, and other applicable provisions of Titles 28 and 49 of the United States Code:
>
> 1. Is injunctive relief precluded by the availability of an adequate remedy in an action to set aside the ICC orders which appellant sought to enjoin?
>
> 2. Must an action to set aside an ICC order be heard and determined by a three-judge court?"

were in both instances subject to the three-judge court requirement.[14] This Court did not remand the appeal; rather it unanimously affirmed the district court's judgment by an eight-to-zero vote.[15] This Court necessarily acknowledged its jurisdiction over the appeal by affirming rather than remanding, and it did so after a full consideration of legislative history set forth above. The Court similarly has jurisdiction to entertain the present appeals.

Appellees in their motions to dismiss ignore the legislative history of the statutory provisions relating to ICC orders and rest principally upon decisions construing the statutory provisions involving injunctions against unconstitutional statutes.[16] Both the legislative development of these latter provisions and the policies underlying them are different than those re-

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[14] The United States and ICC confined their memoranda to these issues. The railroads discussed these issues at length but also contended that, without regard to the questions posed, no one had been prejudiced by the court proceedings and that a one-judge district court, like a three-judge district court, would have been bound to dismiss the complaint.

[15] It should be pointed out that the district court's order in that case, like the order of the district court in the present case, was not literally couched in terms of an order granting or denying an injunction. As the opinion in *Electronic Industries* shows, the court concluded by ordering that "the action is dismissed." 310 F. Supp. at 1289.

[16] *E.g.*, *Public Service Comm'n* v. *Brashear Freight Lines, Inc.*, 306 U.S. 204 (1939); *Mitchell* v. *Donovan*, 398 U.S. 427 (1970); *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963); *Gunn* v. *University Committee to End the War*, 399 U.S. 383 (1970); *Phillips* v. *United States*, 312 U.S. 246 (1941); *Rorick* v. *Board of Comm'rs*, 307 U.S. 208 (1939).

lating to the review of ICC orders.[17] Unlike the narrow construction given to the latter provisions, the provisions requiring three judges to review ICC orders and allowing direct appeals from such decisions have always been construed generously. See p. 11, above. In sum, the cases and arguments advanced by appellees do not even begin to raise any jurisdictional doubts: legislative history, past practice of this Court, and the common understanding of scholars and legislators confirm that the validity of ICC orders must be determined by three-judge district courts and orders of such courts sustaining or setting aside such ICC orders are subject to direct appeal to this Court.[18]

2. Appellees contend that, assuming that this Court does have jurisdiction over the appeals of the railroads and the Government, the substantive issues raised in the jurisdictional statements do not require plenary consideration and the district court's decision should be summarily affirmed on all points. The jurisdic-

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[17] Whereas the legislative history of the provisions relating to ICC orders shows that they were designed to embrace actions to invalidate ICC orders however the actions might be denominated, the legislative history of the provisions relating to unconstitutional statutes shows that they have always been couched to embrace only actions seeking injunctive relief. See, *e.g.*, 36 Stat. 557; *Kennedy* v. *Mendoza-Martinez, supra,* 372 U.S. at 154-55.

[18] Although the clear propriety of review in this Court makes the point academic, it should be noted that appellees would not on any view of the matter be entitled to dismissal of the appeals. Even if this Court decided that the district court's order here was not directly appealable to this Court, the established remedy would be to "vacate the judgment below and remand the case" so that the district court could enter a new order and afford appellants the opportunity to take a timely appeal to the court of appeals. See *Mitchell* v. *Donovan, supra,* 398 U.S. at 431-32 & n.4 (citing authorities).

tional statements of the railroads and the Government showed at length that the questions presented are substantial, recurring, and of great practical significance both for the agency and for the rail transportation system. In light of this showing, it is necessary to comment only briefly on the main contentions made by the appellees.

In the first question presented for consideration by this Court, the railroads urged that under a long-standing line of decisions in the district courts the lower court in this case lacked authority to review general revenue orders of the ICC. The railroads noted that this view was supported by this Court's own recent eight-to-zero affirmance in the *Electronic Industries* case which, like the present case, involved an attack on a particular category of rates. The lower court's departure from this settled principle is not only unnecessary and unwarranted but threatens to delay the administrative process and to inflict serious and irreparable harm upon the railroads. See R.R.J.S. 18-22.

In response, EDF asserts that prior cases holding general revenue orders to be unreviewable involved plaintiffs who had available remedies under Section 13 of the Act, 49 U.S.C. § 13, to challenge the lawfulness of individual rates or rate groups. EDF motion 7-8. The appellees in this case, however, are no less interested in a particular category of rates, rates on recyclable commodities, and such rates are equally subject to complaint and investigation under Section 13. EDF also asserts that it is not seeking an alteration of individual rates but enforcement of the ICC's duties under NEPA. The distinction is semantic: prior attempts to review general revenue orders have similarly been premised on claims that the Commis-

sion's action was inconsistent with statutory standards,[19] and EDF's objective, no less than in prior attacks on general revenue orders, is simply to secure lower rates on the commodities in which it asserts an interest.

The lower court's opinion in this case amply reveals that the linchpin of its claimed authority to review general revenue orders is its view that NEPA has altered preexisting jurisdictional or procedural limitations. See 371 F. Supp. at 1297-98. In the railroads' submission, this is directly contrary to what this Court held in *SCRAP* in considering the closely-related issue of the lower court's claimed authority to enjoin railroads rates pending the outcome of ICC general revenue proceedings. 412 U.S. at 694-95. In all events, in the face of the established line of district court decisions already referred to, the eight-to-zero decision in *Electronic Industries Ass'n,* and the determination made by this Court in *SCRAP,* the question of the lower court's authority to review general revenue orders certainly presents a substantial question that makes summary disposition of the appeal here inappropriate.[20]

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[19] See, *e.g., Electronic Industries Ass'n* v. *United States, supra,* 310 F. Supp. at 1288-89; *Algoma Coke & Coal Co.* v. *United States,* 11 F. Supp. 487, 482 (E.D. Va. 1935).

[20] ISIS in its motion (p. 7) asserts that it is "unnecessary" for this Court to reach this issue because allegedly "NEPA review of general revenue orders is unlikely to be a recurring issue . . . ." In fact, the issue is inevitably going to be recurring, until resolved by this Court, because of the frequency of general revenue proceedings (see R.R.J.S. 22) and the economic interest of the shippers in opposing rate increases despite railroad cost increases. Moreover, this case involves a direct appeal in which the lower court's authority to act and the validity of its decision are necessarily presented.

A second important question for review arises from the lower court's disapproval of the Commission's extensive and detailed environmental impact statement in this case which, as the lower court acknowledged, met "the prescriptions of NEPA as to form." 371 F. Supp. at 1301. The railroads' jurisdictional statement asserted that the lower court's action went far beyond the permissible limits of judicial review by substituting the court's judgment on substantive issues for that of the agency and in virtually dictating the course of proceedings on remand. The railroads also directed attention to the continuing importance of the questions whether impact statements are reviewable on substantive grounds and if so, under what standard, and to the division of authority on these questions in the lower courts. [21]

The main response of all the appellees is that the lower court in this case limited its review to determining the "procedural adequacy" of the impact statement.[22] This contention is answered by even a brief examination of the lower court's opinion. In detailed criticism on the *substance* of the ICC's impact

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[21] NARI's motion (pp. 7, 14) places special emphasis upon *City of New York* v. *United States*, 337 F. Supp. 150 (E.D.N.Y. 1972), which required an environmental impact statement in a railway abandonment proceeding where no such statement had been prepared. In the present case, however, a detailed impact statement has been prepared; and the pertinent decision is the court's *second* opinion in *City of New York*, 344 F. Supp. 929, sustaining the impact statement and emphasizing the very limited office of judicial review once the impact statement has been furnished.

[22] *E.g.*, EDF motion 10. See also ISIS motion 9; NARI motion 15.

statement, the court faults the statement on the alleged grounds that it does not accept arguments of the environmentalists (371 F. Supp. at 1302); does not offer "any rigorous price sensitivity studies of its own" (*id.* at 1303); omits "any comprehensive alternative analysis of the relative cost contribution of secondary and primary materials" (*id.*); does not respond to a particular statement made in a particular study propounded by ISIS (*id.*); does not contain an analysis "of how the underlying rate structure itself affects the environment" (*id.* at 1304); and omits "an elasticity study" favored by the lower court (*id.* at 1305). Apart from the lack of support for these criticisms (see, *e.g.,* R.R.J.S. 24 n. 31), they do not square with any claim that the court's review was merely "procedural."

One related contention made by the lower court is repeated with great vigor in the motions of both EDF and ISIS. Noting that the Commission focused primarily on the environmental impact (if any) of the rate increases involved in *Ex Parte No. 281* and that it is investigating the rate structure itself in *Ex Parte No. 270,* EDF's motion (pp. 12-14) asserts that this amounts to a claim that the Commission may decide for itself when it will comply with NEPA. See also ISIS motion 7-8. The Commission's approach, which is the only feasible one (see Gov. J.S. 14-16), is entirely consistent with NEPA. The statutory language, ignored by appellees, requires an impact statement addressed to the "proposed action" before the agency (Section 102(2)(C)), and this surely requires that the Commission's environmental impact analysis

focus primarily upon the particular rate increase involved in the proceeding.[23]

Finally, in discussing the single truly "procedural" issue in the case, the lower court declared an environmental impact statement must be prepared not only prior to the agency's decision, but also prior to a hearing, even though no decision is made at the hearing stage. This is directly inconsistent with the language of NEPA which requires only that the agency's decision "include" an impact statement in appropriate cases. The statutory language that the impact statement shall "accompany" the proposal through "existing agency review processes" simply has no application where, as here, there is only one decision-making stage involved in the proceeding and no subsequent "agency review processes" exist.

On this point the appellees largely confine themselves to asserting that the lower court was correct and make no effort to come to grips with the language of NEPA or the fact that general revenue proceedings involve only one decision-making stage. They do contend that the request for review on this point merely seeks an "advisory" opinion on this issue. *E.g.*, ISIS motion 12. This contention is clearly mistaken since the lower court specifically relied on the lack of a prehearing impact statement as a subsidiary basis for invalidating the impact statement. 371 F. Supp. at 1300.

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[23] As the railroads previously noted (R.R.J.S. 24 n.31), the Commission did in fact give attention to the underlying rate structure but, in view of *Ex Parte No. 270*, properly did not attempt to turn the present general revenue proceeding into an extensive discussion of all past and future ramifications of the rate structure for environmental interests.

The railroads demonstrated (R.R.J.S. 31-32) that the lower court's approach would require the Commission to add an entirely new and complicating stage to its general revenue proceedings. Even under existing practice, the Commission is often hard pressed to complete such proceedings before the end of the seven-month suspension period, and such delays necessarily cause the railroads to lose substantial and urgently needed revenues. Thus, the lower court's determination not only presents a serious legal issue but also has immediate adverse consequences for the efficient operation of the administrative process and for the financial well being of the nation's railroad industry.

CONCLUSION

For the reasons stated, the Court should note probable jurisdiction of the appeal.

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August 1974

In the Supreme Court of the United States

OCTOBER Term, 1974

No. 73-1971

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

STUDENTS CHALLENGING REGULATORY AGENCY
PROCEDURES (S.C.R.A.P.), ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE APPELLANTS IN OPPOSITION TO THE MOTIONS TO DISMISS

The appellees—National Association of Recycling Industries, *et al.* (NARI), Institute of Scrap Iron and Steel, Inc. (ISIS), and Environmental Defense Fund, *et al.* (EDF)— move to dismiss on the ground that this Court has no jurisdiction of this direct appeal from an order of a three-judge district court vacating and remanding a final order of the Interstate Commerce Commission.[1] They contend that 28 U.S.C. 1253 authorizes direct appeals only from three-judge district court decisions which grant or deny injunctions, and, since there is here no appeal from the denial by the court below of the injunction against the collection of the new rates, jurisdiction does not lie under 28 U.S.C. 1253.

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[1]Appellees' other contentions are answered in our Jurisdictional Statement.

This contention is without merit, as demonstrated both by the legislative history of the statutes involved and the consistent practice of this Court.

The legislative history of 28 U.S.C. 2321-2325, governing the enforcement and review of Commission orders, as well as of 28 U.S.C. 1253, indicates that Congress treated actions to set aside, annul, or vacate and remand ICC orders and actions for injunctions against their enforcement as functionally equivalent, and intended to make no distinction in the procedures applicable to them.

Sections 2321-2325 derived from the Urgent Deficiencies Act of 1913, 38 Stat. 208, 219-220, (the "Expediting Act") which specified that:

> No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted [except by a three-judge district court]. * * * An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case * * * ; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. A final judgment or decree of the district court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree * * * .

The language of the Expediting Act was carried forward in the various versions of the Judicial Code before 1948. See, *e.g.*, 28 U.S.C. (1940 ed.) 47, 47a.

When the Judicial Code of 1948 was enacted into positive law, the present statutory language first appeared. While the introductory language (28 U.S.C. 2321) used the traditional terms for describing the review jurisdiction, the three-judge provision (28 U.S.C. 2325) now referred, telescopically, to an action for "[a]n interlocutory or permanent injunction" instead of the previous separate references to orders "granting or denying * * * an interlocutory injunction" and suits to "suspend or set aside." Similarly, 28 U.S.C. 1253, providing for direct Supreme Court review, referred, generically, only to orders granting or denying injunctions in civil actions required to be heard by a three-judge court.

Nothing in the brief legislative history of the 1948 revision suggests that any change in the three-judge requirement and direct appeal provisions was intended.[2] Rather, the history indicates that the procedural structure for review of ICC orders was to remain unchanged.

The reviser's notes, printed as an Appendix to the House Report, indicate that harmony with the Expediting Act of 1913 was intended in Sections 2321-2325. H. Rep. No. 308, 80th Cong., 1st Sess., A183, A184.[3] Similarly, the reviser's note to 28 U.S.C. 1253 states that it was designed merely to consolidate the earlier provisions "relating to direct appeals from decisions of three-judge courts involving orders of the Inter-

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[2]An intent to make substantive changes in such a codification of the laws will not be inferred in the absence of a clear legislative expression of such intent. *United States* v. *Ryder*, 110 U.S. 729, 740.

[3]The change in formulation apparently was because the Expediting Act provisions regarding composition and procedures in the three-judge district courts were included in 28 U.S.C. 2284, and the provisions for direct appeal to this Court were covered in 28 U.S.C. 1253, and, as regards the time for appeal, in 28 U.S.C. 2101. *Id.* at A184.

state Commerce Commission" with other direct appeal provisions. *Id.* at A106. The note states that the Section is based on, *inter alia,* 28 U.S.C. (1940 ed.) 47 and 47a, which as noted p. 2, *supra,* contained the Expediting Act language permitting direct review of all three-judge district court orders setting aside ICC orders.

The legislative history thus indicates that 28 U.S.C. 1253 should not be read as limiting the right of direct appeal to cases in which a district court in terms enjoins the enforcement of an ICC order. Instead, that Section was intended to apply also whenever a district court vacates and remands, or otherwise sets aside, an ICC order.

This Court has consistently so applied 28 U.S.C. 1253. For example, in *Atchison, Topeka & Santa Fe R. Co.* v. *Wichita Board of Trade,* 409 U.S. 1005, 412 U.S. 800, it noted probable jurisdiction and decided on direct review a case in which a three-judge court had not in terms enjoined an ICC proceeding, but instead suspended the proposed charges and remanded the proceeding to the Commission. See *Wichita Board of Trade* v. *United States,* 352 F. Supp. 365, 369 (D. Kan.).

Indeed, the question of the equivalence of an action to set aside an ICC order and an action to enjoin such an order was raised by the Court *sua sponte,* and decided, in *Electronic Industries Association* v. *United States,* 401 U.S. 967. There, a three-judge court had dismissed a suit challenging a general revenue order of the Commission on the ground that the plaintiff shippers had failed to exhaust their administrative remedies. *Electronic Industries Association* v. *United States,* 310 F. Supp. 1286 (D.D.C.). On direct appeal, this Court asked the parties to file

additional memoranda discussing the relationship between a suit to enjoin and an action to set aside an ICC order, and discussing whether an action to set aside an ICC order must be determined by a three-judge court. The government responded to this request in a Supplemental Memorandum[4] which urged that, for the purpose of the three-judge court provisions (necessarily including the direct review provisions), suits to enjoin or to set aside ICC orders are functionally equivalent.[5] The Court apparently agreed with this reasoning, evidencing its conclusion that it had jurisdiction of the case on direct review by affirming the district court's order (401 U.S. 967). Similarly, here the three-judge district court's judgment vacating the Commission order, reopening the proceeding, and remanding the case to the Commission, is properly before this Court on direct review.

For the reasons stated in the Jurisdictional Statement, probable jurisdiction should be noted.

Respectfully submitted.

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OCTOBER 1974.

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[4]We are sending appellees a copy of this memorandum.

[5]This equivalence is evident in the present case, for example, in which the district court specifically ordered that "Ex Parte No. 281 is to be reopened for further proceedings consistent herewith" (J.S. App. 50a). Thus, under the district court's order, the Commission cannot terminate its proceeding without complying with the court's highly detailed directives concerning the environmental impact statement. For all practical purposes, therefore, the Commission is in the same position as if the court had in terms issued an injunction requiring it to take such action. And it is, of course, immaterial for purposes of this Court's appellate jurisdiction under 28 U.S.C. 1253, whether such an injunction is properly characterized as interlocutory or permanent.

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No. 73-1966

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

ABERDEEN AND ROCKFISH RAILROAD COMPANY, *et al.*,
Appellants,

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL.

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December 1974

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28 U.S.C. § 1336 .....2, 22
28 U.S.C. § 2111 58
28 U.S.C. §§ 2321-25 .....2, 22

MISCELLANEOUS:

Council on Environmental Quality Guidelines, 36 Fed. Reg. 7724 (April 23, 1971) 35

Hearings on S. 1075, S. 237 and S. 1752 Before the U.S. Senate Committee on Interior and Insular Affairs, 91st Cong., 1st Sess. (1969) 35

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1966

ABERDEEN AND ROCKFISH RAILROAD COMPANY, *et al.*,
Appellants,

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL.

OPINIONS BELOW

The opinion of Judge Wright and the dissenting opinion of Judge Flannery, which are reprinted at Appendix A of the Government's jurisdictional statement,[1] are reported at 371 F. Supp. 1291. The ICC's

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[1] The United States and the Interstate Commerce Commission have appealed from the same order and decision that are the subject of this appeal. No. 73-1971. Their jurisdictional statement is hereafter cited as "Gov. J.S."

report in *Ex Parte No. 281* served on October 4, 1972, which is reprinted in pertinent part at Gov. J.S. App. D, is reported at 341 I.C.C. 290; the ICC's order served on May 7, 1973, which is reprinted at Gov. J.S. App. E, is unreported; and the ICC's final environmental impact statement is reported at 346 I.C.C. 88 (A. 10).[2]

JURISDICTION

This suit was initiated by appellee SCRAP in the District Court in May 1972, pursuant to 28 U.S.C. §§ 1336, 2321-25, to enjoin orders of the ICC. The decision and order of the District Court at issue in this appeal, which are reprinted respectively at Gov. J.S. App. A and App. D, were entered on February 19, 1974. On April 19, 1974, appellants Aberdeen and Rockfish Railroad Company, *et al.*, filed a notice of appeal to this Court, and on June 13, 1974, Mr. Chief Justice Burger extended the time to docket the appeal to and including July 2, 1974. Jurisdiction of the appeal is conferred on this Court by 28 U.S.C. § 1253. See *Baltimore & O. R.R.* v. *United States,* 386 U.S. 372 (1967).

STATUTE INVOLVED

The statutory provision pertinent to this appeal is Section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C), which reads in pertinent part as follows:

"The Congress authorizes and directs that, to the fullest extent possible: . . . (2) all agencies of the Federal Government shall—

* * *

[2] References to "A." are to the Appendix in this Court.

"(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes. . . ."

QUESTIONS PRESENTED

1. Does the District Court have jurisdiction to review general revenue orders issued by the Commission which did not determine the justness and reasonableness of any particular rates but merely terminated suspensions of carrier-made rates shortly before the conclusion of the maximum statutory suspension period?

2. Does the National Environmental Policy Act contemplate that courts will review the substantive determinations made by agencies in their environmental impact statements and, assuming *arguendo* that such review is permitted, does the District Court have any adequate basis for setting aside the ICC's extensive and detailed environmental impact statement in this case or any authority to prescribe on remand what evidence, arguments and procedures may or may not be adopted by the agency?

3. Where the sole and exclusive decision in a general revenue proceeding is reached by the Commission itself, and where the Commission has provided ample opportunity to all parties to introduce evidence and to comment upon its draft impact statement, does NEPA require still further proceedings, which cannot reasonably be expected to alter the outcome?

STATEMENT OF THE CASE

In November 1972 the Interstate Commerce Commission suspended general rate increases filed by the railroads on virtually all interstate freight traffic so far as the increases applied to recyclable commodities. The ICC then prepared a draft environmental impact statement and received comments upon it. Shortly before the end of the suspension period it

issued a final impact statement of almost 200 pages, discussing in detail each of the issues specified by the National Environmental Policy Act ("NEPA") and concluding that the increases would have no significant adverse effect on the quality of the human environment.

In the decision here on appeal, the District Court undertook to review the Commission's general revenue orders; recognizing the long-standing rule against review of such orders, the District Court by a two-to-one vote determined that NEPA cases constituted an exception to the rule. The majority then vacated the ICC's orders respecting the rate increases on recyclable commodities on the ground that the impact statement was inadequate.

A. Proceedings Prior to the Impact Statement.

In March 1972, not long after the railroads introduced a 2.5 percent temporary emergency surcharge on nearly all freight rates, they filed tariffs providing for permanent increases on almost all commodities.[3] These increases, averaging about 4 percent, were intended to supersede the flat surcharge and to offset in part enormous, recent increases in operating costs. On April 24, 1972, shortly before the new increases were to become effective, the Commission suspended the increases for the full seven-month period permitted by Section 15(7) of the Interstate Commerce Act,

[3] The 2.5 percent temporary emergency surcharge was the subject of this Court's decision in *United States* v. *SCRAP*, 412 U.S. 669 (1973). The Court there held that the District Court's July 1972 injunction against the surcharge, which had caused the railroads approximately $5.5 million in irreparable losses, was contrary to the Interstate Commerce Act and this Court's decision in *Arrow Transp. Co.* v. *Southern Ry.*, 372 U.S. 658 (1963).

49 U.S.C. § 15(7), to and including November 30, 1972, and proceeded to investigate them.

The investigation, conducted primarily through written evidentiary submissions (see, *e.g.*, A. 421-565), concluded in June 1972 with an oral argument to the full Commission. On October 4, 1972, it served a lengthy report directed to the permanent increases. 341 I.C.C. 290. The report, almost 300 pages long, examined in detail the railroads' revenue needs, environmental considerations, and the application of the proposed increases to a large number of commodity groups comprising a vast number of individual commodities. The Commission determined to allow the increases to go into effect shortly before the end of the suspension period, provided that the railroads established certain limits on certain of the increases, but the Commission did not definitively determine the lawfulness of any individual rates on particular movements. 341 I.C.C. at 528-30.

The October 4 report confirmed the railroads' critical need for increased revenue. It showed that the proposed increases, even if made fully effective, would cover only about one-fourth of the $1.6 billion increase in costs which the railroads had suffered between the last general rate increase and April 1972; and the computation did not reflect additional cost increases, exceeding three-quarters of a billion dollars annually, scheduled to become effective between April 1972 and April 1973, largely as a result of new wage and tax increases.[4] The report also considered other indices of

[4] 341 I.C.C. at 297-303; affidavit of William F. Betts, Dec. 12, 1972, para. 5, submitted to the court below. The railroads have since estimated that the rate increases represent approximately $350 million annually, including $340 million on nonrecyclables and $10 million on recyclables. Betts aff'd, para. 6.

financial condition such as working capital, equipment obligations, cash flow, and rate of return. 341 I.C.C. at 303-08. For example, it found that net working capital, a key index of financial condition, had continued to decline steadily and had now approached or reached a *deficit* figure, depending on the region and method of computation. *Id.* at 304.

The report extensively discussed environmental considerations, including the limited role played by rate levels as compared with service factors and the railroads' own incentive not to apply the increases where this could result in loss of traffic. 341 I.C.C. at 322-25. It also examined the application of the increases to specific groups of recyclable commodities such as iron and steel scrap, paper scrap, textile waste, and others. *Id.* at 358-69, 392-413. It concluded that the increase would have no significant adverse effect on the quality of the environment, and for this reason the Commission did not prepare a formal environmental impact statement.[5]

The increases on nonrecyclables became effective on October 23, 1972, but the Commission's report continued the suspension on recyclables in order to receive further comments. 341 I.C.C. at 571. A number of interested parties including the Council on Environmental Quality ("CEQ") and the Environmental Pro-

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[5] Under Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C), it is only where such a significant impact will occur that an agency is required to prepare an environmental impact statement. Although the District Court in its July 1972 decision said that a bare finding of no impact by the agency would not satisfy this requirement, it stated that the case might appear differently "if the record revealed a detailed study by the Commission at the conclusion of which it found no significant environmental impact and, hence, no need for an impact statement." 346 F. Supp. at 201 n.17.

tection Agency ("EPA") urged the ICC to prepare a full environmental impact statement on the recyclables despite the report's conclusion that there would be no adverse environmental impact (A. 566, 572). On November 7, 1972, the Commission entered an order suspending the selective increases on recyclables for the statutory seven-month period to and including June 10, 1973, and it reopened the proceeding to consider further the environmental issues.[6]

On the same day that the Commission entered this order, SCRAP filed papers in the District Court seeking to enjoin the increases both on recyclable and nonrecyclable commodities. On January 9, 1973, the District Court denied the requested injunction. *SCRAP v. United States,* 353 F. Supp. 317 (D. D.C. 1973). It held that no injunction was required with respect to the increases on recyclables since those increases had been suspended by the November 7 order. As for the nonrecyclables, the court gave a number of reasons for denying injunctive relief: these included "the obvious fact that it is in their [the railroads'] own self interest to request and implement rate increases only where there is no reasonable prospect of diversion to other means of transport" (*id.* at 323) and "the substantial and irreparable harm to the nation's railroads that such relief would cause." *Id.* at 323-24.

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[6] What the Commission suspended was the portion of the new tariff filed by the railroads in October 1972, following the October 4 report, so far as the tariff provided for general increases on recyclables effective November 12, 1972. Since these were largely the same rates that had been suspended in April 1972, it is doubtful whether the Commission had power unilaterally to suspend the rates for an additional seven months. However, the railroads, as they have in other instances, consented to the further suspension in this case.

B. The ICC's Preparation of the Environmental Impact Statement.

Shortly after reopening the investigation in November 1972, the ICC moved to supplement the already extensive body of information concerning environmental issues that had been reflected in its October 4 report. In December 1972, it published a lengthy bibliography of articles and studies concerning recycling and related matters and it requested that interested parties supplement this list of relevant materials. A number of different parties did file responsive statements and the Commission's notice stated that a further opportunity for comment would be provided after release of a draft environmental impact statement.[7]

The Commission issued its draft impact statement on March 5, 1973 (A. 200). A number of parties submitted comments including CEQ and EPA. The comments of SCRAP, the appellee Environmental Defense Fund ("EDF"), and EPA were critical (A. 653, 633, 707); those of CEQ were somewhat more measured and concluded: "Once again, we commend the Commission for its efforts in assembling this statement and hope that the deficiencies identified by commenting parties will be carefully considered in preparing the final statement and in evaluating and selecting among possible alternative actions" (A. 706).

After reviewing comments from interested persons, the Commission on May 7, 1973, served its final environmental impact statement relating to the selective increases on recyclable commodities.[8] 346 I.C.C. 88 (A.

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[7] A copy of the bibliography is attached to the final environmental impact statement (346 I.C.C. at 239-59 (A. 161-81)) together with the supplementary list (*id.* at 259-60 (A. 181-82)).

[8] A Commission order incorporating the impact statement and discontinuing the investigation accompanied the impact statement. Gov. J.S. App. E.

10). It concluded that the increases in question would *not* have a significant adverse effect on the environment and it also concluded that any unanticipated environmental costs which might result were outweighed by the economic benefits derived from the sound rail transportation service which would be fostered by the additional revenues. *Id.* at 236-37 (A. 158-59). It based this conclusion upon 150 pages of discussion, followed by nearly 40 pages of appendix materials.

The impact statement examined the nature of the railroad rate structure and related allegations that the existing structure discriminates against recyclable commodities. 346 I.C.C. at 102-33 (A. 24-55). The Commission noted that its general revenue proceeding was not designed to prescribe individual rates and did not foreclose any shipper from obtaining relief on individual commodities in complaint proceedings under Sections 13 and 15 of the Interstate Commerce Act, 49 U.S.C. §§ 13, 15, and it observed that a further examination of issues involving alleged discrimination would be made in the Commission's pending general investigation into the freight rate structure, *Ex Parte No. 270. Id.* at 103 (A. 25). Nevertheless, the Commission undertook to examine the claims of discrimination relating to the existing railroad rate structure, and it found those charges to be without merit.

It concluded that the main allegations of discrimination rested essentially on surface comparisons of the rates per hundredweight or per gross ton for recyclables, such as iron and steel scrap, as compared with allegedly competing raw commodities, such as iron ore. Such comparisons, it stated, totally ignored the transportation characteristics of the different commodities and, as the proponents of the arguments

well knew, no meaningful determination of discrimination could be made from such comparisons.[9] For example, whereas iron ore moved in huge volume on a regular basis between a limited number of points, iron and steel scrap moved irregularly, in small volume shipments, between many points located over a vast area, and the costs of such scrap carriage were substantially greater. *Id.* at 117-28 (A. 39-50).[10]

Strikingly, the Commission found that while the variable cost of handling iron and steel scrap was much higher than the cost of handling iron ore, the railroads earned significantly *less* profit per ton of scrap than per ton of iron ore. 346 I.C.C. at 123-24 (A. 45-46). In addition, the Commission subsequently noted that when all of the components of finished iron and steel were considered, the rail rates for moving iron and steel scrap were *lower* than the rail rates for moving the amount of raw material including iron ore necessary to produce an equivalent amount of finished iron or steel. This existing rate advantage of scrap, from a competitive standpoint, would actually be in-

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[9] The Commission showed that it is well settled under the governing statute, judicial decisions, and agency precedents that two commodities do not receive the same rate treatment simply because their weight may be the same; rates are fixed based on a range of characteristics including, in particular, numerous factors affecting the cost of transportation of the commodity: ease of handling, regularity of movement, size of the average shipment, susceptibility of damage, and many other characteristics. *Id.* at 104-09 (A. 26-31).

[10] Based on transportation revenues, iron and steel scrap represents approximately 50 percent of the rail shipments of recyclables or as much as all other categories together. Iron and steel scrap is significant in another respect: rail transportation of this scrap is concentrated in the northeastern United States, financially the most seriously stricken of the three transportation districts.

creased by the percentage rate increases in question. *Id.* at 145-60 (A. 67-82).[11]

The Commission then turned to the question of the impact that the selective increases would have on the environment and concluded that there would be no significant adverse impact. 346 I.C.C. at 134, 147-48 (A. 56, 69-70). It based this judgment upon the history of past rate changes on recyclables, its evaluation of environmental materials listed in the bibliography and in the record, statistical data, and an elaborate category by category examination of individual recycling industries which followed. *Id.* at 134-216 (A. 56-138). In particular, the Commission pointed out that the railroads' carriage of total waste and scrap materials had increased substantially in prior years despite continuing rate increases and that the growth rate outstripped the growth of railroad traffic as a whole. For example, the volume of scrap materials increased 7.29 percent between 1968 and 1969, despite increases in both years, while total traffic increased only 0.39 percent. *Id.* at 146-47 (A. 68-69).[12]

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[11] The Commission found (*id.* at 159 (A. 81)) that "the shipping cost per ton of [iron and steel] scrap without the *Ex Parte No. 281* rate increase is $5.58, while the total transportation cost of the equivalent amount of raw materials is $8.49. With the present rate structure, it costs $2.91 less to ship scrap than the comparable raw materials. With the implementation of *Ex Parte No. 281*, the average cost of transporting 1 ton of scrap will be $5.83, and the cost of transporting the comparable raw materials $8.87. Thus, shippers would need to pay $3.04 more to transport raw materials than the corresponding amount of scrap. . . . The difference in transportation costs of raw materials and scrap will increase with *Ex Parte No. 281*, favoring scrap by an additional 13 to 16 cents."

[12] In its general discussion of environmental impact, the impact statement also examined claims that the rate increases would divert traffic to trucks. The Commission rejected the claim, declaring that apart from the impact of other factors in determining the mode of transportation, the argument ignored the swiftly rising truck rates and the readiness of railroads to hold down increases threatening diversion. *Id.* at 136-43 (A. 58-65).

The statement then examined separately particular major categories of recyclable commodities. In considering iron and steel scrap which is by far the largest category, the ICC discussed, *inter alia,* the nature of the steel-making industry, steel technology, and the scrap industry structure and its technology; demand and pricing patterns for iron and steel scrap; comparative rail rates of scrap and raw materials; and many similar factors. 346 I.C.C. at 148-60 (A. 70-82). The Commission noted, for example, that despite changes in price, the amount of scrap used in the total furnace charge by the steel industry has remained constant for almost 30 years (*id.* at 149 (A. 71)); that identifiable bottlenecks in the processing of iron and steel scrap have nothing to do with rates (*id.* at 150 (A. 72)); and the scrap, as noted earlier, enjoys an *advantage* vis-a-vis raw materials which will be increased by the rate increases in question (*id.* at 159 (A. 81)). The high-cost characteristics of transporting scrap had been discussed earlier. *Id.* at 119-28 (A. 41-50).[13]

The impact statement went on to discuss separately paper scrap (*id.* at 160-76 (A. 82-98)); textile wastes (*id.* at 177-82 (A. 99-104)); petroleum refining waste and waste sulfides (*id.* at 182-85 (A. 104-07)); scrap glass (*id.* at 186-95 (A. 108-17)); nonferrous metal scrap (*id.* at 196-201 (A. 118-23)); plastic scrap (*id.*

[13] The views expressed by the Commission were, in fact, wholly consistent with affidavits of steel companies themselves which the railroads introduced in the District Court in opposition to the requested injunction. See p. 16, below. These affidavits confirm that the mix of raw ore and scrap used by the steel industry is determined essentially by technological factors and demand for the finished product and has virtually nothing to do with freight rates. These affidavits were furnished by companies which, obviously, have no interest in seeing higher freight rates on the products they utilize.

at 202-09 (A. 124-31)); fly ash and other industrial ashes (*id.* at 209-15 (A. 131-37)). In each instance, the Commission examined the record evidence and the allegations of the parties urging exemption of recyclables from the rate increases and it found that the evidence did not justify the conclusion that the increases would have any significant impact on the movement of recyclables.[14]

In addition, the Commission considered the adverse effects of *not* having the increases in question. It stated that "the railroads require these increases to continue to operate in an economic and efficient manner. Failure to approve these increases would endanger the continued existence of the railroads, and, accordingly, would have a far greater potential adverse effect upon the quality of our environment than any minor diversion from rail carriage that may occur now." *Id.* at 217 (A. 139).[15] The ICC also considered alternatives to the proposed rate increases including the further extension of multiple car rates on scrap, hold-downs of increases on recyclable commodities, subsidies to carriers and similar alternatives. *Id.* at 218-35 (A. 140-57).

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[14] A typical example was textile waste. The Commission found that the difficulties of that industry were due basically to technological and marketing problems, including the increased use of synthetics, that would be unaffected by rate changes; that in a number of instances the rates on textile waste did not even cover the costs of handling the traffic; and that the claims of the proponents of exemption were based on infirm data. *Id.* at 177-82 (A. 99-104).

[15] Earlier, the Commission had noted that the ability of the railroads to carry freight at all including recyclables and the ability to fund their own increasingly expensive environmental programs would be adversely affected in the absence of rate increases. *Id.* at 134-36 (A. 56-58).

C. Court Proceedings Following the Impact Statement.

The final impact statement was served by the Commission on May 7, 1973. Then, on May 30, only eight days before the impact statement's effective date, SCRAP and EDF filed a short motion in the District Court for a preliminary injunction against the new increases on recyclables which the railroads intended to make effective at the end of the suspension period on June 10, 1973. On June 7, 1973, the day the Commission had contemplated that its final impact statement would become effective, the District Court enjoined the Commission and the railroads from collecting the proposed increases on recyclables "until further order of this court." Order of June 7, 1973. The four-paragraph injunctive order contained conclusory assertions that the plaintiffs had established the requisites for preliminary relief and stated, inaccurately and without explanation, that injunctive relief "will not substantially harm the railroads." *Id.*[16]

On June 8, 1973, Mr. Chief Justice Burger granted a stay of the injunction.[17] Thereafter, the increases on recyclables were placed in effect and continue in effect today. On November 19, 1973, this Court for the second time in the course of this litigation overturned the judgment of the District Court, and it remanded the case for further consideration in light of *Atchison,*

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[16] The general increases on recyclables in fact represent approximately $10 million per year in increased revenues. Affidavit of William F. Betts, June 6, 1973, para. 2, submitted in this Court in connection with the railroads' application for a stay of the District Court's preliminary injunction of June 7, 1973.

[17] SCRAP, EDF, and one of the trade associations subsequently filed applications with the full Court to vacate the stay issued by the Chief Justice. On June 25, 1973, this Court denied the application to vacate the stay. 413 U.S. 917.

T. & S.F. Ry. v. *Wichita Board of Trade,* 412 U.S. 800 (1973). 414 U.S. 1035-36.

While the appeal of the District Court's preliminary injunction was pending before this Court, the appellees filed motions for summary judgment in the District Court seeking two principal forms of relief:[18] first, a declaration that the ICC's general revenue orders were unlawful because the environmental impact statement in *Ex Parte No. 281* was inadequate; and second, permanent injunctive relief forbidding the railroads from collecting the permanent rate increases on recyclables which were the subject of *Ex Parte No. 281* or from collecting any further rate increases on recyclables obtained in any subsequent proceeding.

In response, the railroads filed a memorandum and numerous supporting affidavits.[19] The affidavits established the substantial and irreparable losses totalling $10 million per year that an injunction against rate increases on recyclables would cause the railroad industry; the readily identifiable cost increases, greatly in excess of additional revenues, the railroads continued to suffer; and the extremely serious condition of

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[18] In addition to SCRAP, which filed a motion for summary judgment below, the following intervenors also filed such motions: the EDF and two associated organizations, the National Parks and Conservation Association and Izaak Walton League of America; the National Association of Recycling Industries, Inc., ("NARI") and three of its members; and the Institute of Scrap Iron and Steel, Inc. ("ISIS") and one of its members.

[19] Included among these were an affidavit from Mr. Betts, Vice President for Economics and Finance of the Association of American Railroads; affidavits from railroad experts in the transportation of ferrous scrap and nonferrous metal scrap, paper scrap and textile waste, rubber scrap, plastic scrap and chemical wastes, and glass scrap; affidavits from two major steel companies, Bethlehem and National; and affidavits of seventeen individual railroads.

the railroad industry exemplified by major railroad bankruptcies throughout the East and the threat of further bankruptcies elsewhere.[20]

The affidavits also demonstrated that any significant reduction in the railroads' revenues would, in light of their present financial state, be translated directly into poorer service for the public.[21] Furthermore, the affidavits showed that an injunction would have had an immediate and adverse impact on the environment as well as rail transportation service generally. Reduced service, decreased car supply, and deteriorating plant impair the railroads' ability to transport all commodities (*e.g.*, Lehigh Valley aff'd, para. 5; MKT aff'd, p. 4), and bear with particular force on recyclable materials because many of them cannot feasibly be moved unless they are moved by rail. See, *e.g.*, Betts aff'd, para. 9.[22]

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[20] The serious financial plight of the railroads was confirmed by virtually all of the railroad affidavits. See, *e.g.*, Central of New Jersey aff'd, paras. 2-5; Rock Island aff'd, pp. 2-3. In several cases, including the Penn Central and Reading, railroads currently in reorganization were now confronted with serious shortages of cash necessary simply to maintain operations.

[21] They showed, for example, that the loss of the $10 million in annual revenues here in question would mean that maintenance would have to be reduced, new cars could not be financed, and the railroads' physical plant including track would deteriorate even further, causing still more serious transportation problems in the future. *E.g.*, Burlington Northern aff'd, paras. 5, 16; Milwaukee aff'd, para. 16.

[22] In addition, the railroads' own environmental programs, which now cost approximately $100 million per year to maintain at their current level, would be adversely affected by the injunction (Betts aff'd, para. 10), including major expenditures for diesel emission control; roadside fire control; weed and brush control; pollution control at maintenance shops; separation of oil from drainage; and elimination of stationary stack emissions. See, *e.g.*, Illinois Central Gulf aff'd, p. 7; Southern Pacific aff'd, paras. 17-18.

In addition, consistently with the impact statement's conclusions, the affidavits showed that the increases here at issue would not discourage the movement of recyclable commodities or result in their diversion to trucks. This was established by the railroads' own past experience (*e.g.*, Southern aff'd, pp. 4-5); their experience with the increases involved in this case (*e.g.*, Reading aff'd, para. 7); and experts familiar with individual commodities.[23] Finally, the affidavits demonstrated that rail rate charges are carefully calculated to avoid increases which would risk a loss of traffic and thereby defeat the purpose of the increases. See, *e.g.*, N&W aff'd, para. 5.[24]

On February 19, 1974, the District Court, by a two-to-one decision, vacated the Commission's orders respecting the rate increases on recyclable commodities and remanded the case to the Commission for further proceedings with respect to the environmental issues involved. 371 F. Supp. 1291 (Gov. J.S. 1a). Judge Wright's opinion concluded that NEPA challenges to general revenue orders were an exception to the previous rule that such orders were not reviewable at this stage. 371 F. Supp. at 1296-98 (Gov. J.S. 17a-

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[23] Notably, a graph comparing rail rate increases on ferrous scrap during the past five years and figures showing the actual tonnage of such scrap moved by the Penn Central in this period vividly demonstrated that there is *no correlation* between the two. See Scanlan aff'd, ex. 1.

[24] Where general increases may threaten to discourage or divert traffic because of local circumstances, the railroads meet the problem by applying individual hold-downs limiting or rendering inapplicable rate increases for particular movements. See, *e.g.*, Lehigh Valley aff'd, para. 6.

20a). The opinion then criticized and condemned the views expressed in the impact statement.[25]

In dissent, Judge Flannery, following the reasoning of this Court in *SCRAP*, concluded that "there is no indication that Congress intended N.E.P.A. to overrule the long line of judicial decisions holding that general revenue orders, such as those presented in this case, are not reviewable by the courts." 371 F. Supp. at 1311 (Gov. J.S. 53a). Alternatively, he concluded that the impact statement "clearly [represented] the 'hard look'" at environmental consequences mandated by NEPA and that further proceedings were a largely "ritualistic act." *Id.* at 1312 (Gov. J.S. 55a).

SUMMARY OF ARGUMENT

The lower court's assertion of jurisdiction is contrary to the long-standing rule against review of general revenue orders of the Commission. The lower court's claim that there is a "NEPA exception" to this rule is directly inconsistent with this Court's decision in *SCRAP* that NEPA was not intended to alter pre-existing jurisdictional rules. 412 U.S. at 692-98. The lower court's attempted justification for its proposed NEPA exception is unpersuasive and, ironically, rests largely on a constricted view of standing of environmental groups which both the lower court and this Court specifically rejected in *SCRAP*.

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[25] The court refrained, however, in light of this Court's decision in *Wichita Board of Trade*, from enjoining the railroads from collecting the increased rates on recyclables pending the Commission's reconsideration. None of the plaintiffs in the District Court has appealed from the denial of the injunction.

The lower court's expression of doubt about the continued viability of the general rule against review is unsound. In a closely analogous case, this Court only a few years ago unanimously reaffirmed the general rule at least so far as it applies to attacks on general revenue orders which, like the attack here, are directed to particular rate categories as opposed to general revenue findings. *Electronics Industries Ass'n* v. *United States,* 401 U.S. 967 (1971), *aff'g* 310 F. Supp. 1286 (D.D.C. 1970). The general rule is, moreover, entirely sound both on policy and precedential grounds.

If this Court does reach the merits, it should reverse the lower court's decision that the impact statement in this case is inadequate. The Commission's detailed impact statement of almost 200 pages gave careful consideration to each of the major arguments made by those urging an exemption of recyclables from rate increases borne by all other products; it treated each category of recyclables in depth; and it specifically concluded that the rate increases here in question—applicable to alleged competing products as well as to recyclables—would not adversely affect the environment.

The individual criticisms of the impact statement made by the lower court are, for the most part, disagreements with the Commission's appraisal of the evidence, its choice of analytical methods, and its policy judgments. Nothing in NEPA contemplates substantive judicial review of this type which would disrupt both the courts and the agencies. Moreover, the lower court's substantive criticisms are based on misunderstandings of what the Commission actually found and what NEPA requires.

Finally, the lower court's "procedural" objections are equally without merit. Its attack on the Commission's failure to revise its October 4th report in light of the impact statement makes no sense, since the impact statement confirmed the environmental determinations made in the earlier report and required no alteration of any other conclusions. The lower court's subsidiary ruling that further hearings should be held, despite the opportunity afforded to all parties to offer environmental evidence and to comment on the draft impact statement, finds no support in NEPA or the precedents and would represent a pointless ritual productive of nothing but further delay.

ARGUMENT

I. THE DISTRICT COURT LACKED JURISDICTION TO REVIEW THE COMMISSION'S GENERAL REVENUE ORDERS.

The lower court's decision rests upon the mistaken premise that there is a "NEPA exception" which allows it to review general revenue orders that would not otherwise be reviewable. This position is contrary to this Court's decision in *SCRAP* and is unsupported by persuasive reasoning. The general rule precluding review of general revenue orders at this stage, so far as it applies to attacks on particular commodity groups, was unanimously sustained by this Court and is entirely sound.

A. The Long-Standing Rule Establishing the Unreviewability of General Revenue Orders, Which Are Merely an Interim Stage in the Rate-Making Process, Precludes Judicial Review of the Commission's Orders in This Case.

As its opinion in this case shows (see 371 F. Supp. at 1310 (Gov. J.S. 50a)), the lower court's decision was directed specifically against two orders of the

ICC entered in a general revenue proceeding and a related environmental impact statement: one order implemented the Commission's report of October 4, 1972, and the other order, served on May 7, 1973, adopted the final impact statement and terminated the reopened proceeding. The lower court's authority to review the impact statement depends, of course, on its authority to review the ICC orders themselves.[26]

Each of these orders reviewed by the lower court terminated the suspension of the rates shortly in advance of the end of the seven-month period, and, if neither order had been issued, the rates would still have become effective by operation of law at the end of the period. In neither order did the ICC make any definitive finding that the particular rates at issue were just and reasonable, and neither order cut off the rights of any interested party to file a complaint with the Commission to establish that particular rates are unlawful.[27] Instead, the ICC's determinations were typical of general revenue proceedings, for they represented only initial judgments about broad rate

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[26] The lower court is a statutory three-judge court empowered to review ICC "orders" (28 U.S.C. §§ 1336(a), 2321-25), and the decision below explicitly recognized that the District Court's authority to review the ICC orders presented a threshold jurisdictional problem. 371 F. Supp. at 1296-98 (Gov. J.S. 14a).

[27] The ICC emphasized this in its impact statement, explaining: "Thus, we do not attempt to determine whether the particular rates which result from the increases are maximum reasonable rates, nor does the order constitute a prescription of rates within the meaning of the decision in *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370. If individual rates or groups of rates are believed to be unjust and unreasonable, a shipper or other interested persons has an administrative remedy available in sections 13 and 15 of the Interstate Commerce Act, 49 U.S.C. §§ 13 and 15." 346 I.C.C. at 103 (A. 25).

categories based principally upon an appraisal of railroad revenue needs.[28]

Because they do not foreclose shipper remedies or determine finally the lawfulness of any individual rate, general revenue orders are comparable to suspension orders directed to particular rates; and their basic function—as this case demonstrates—is to fix the duration of a suspension involving numerous rates, just as a conventional suspension order operates upon an individual rate.[29] Such orders thus represent only an interim stage in the rate-making process; any rate which has been raised as a result of a general increase proceeding may be challenged subsequently in a complaint case by any interested party on any ground that would ordinarily be available. This is true of all rates involved in the present case including rates on recyclable commodities.

For almost 40 years it has been the settled rule in the lower courts that general revenue orders, like suspension orders directed to individual rates, are not reviewable.[30] The rule, as the cases disclose, is

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[28] See *United States* v. *SCRAP*, *supra*, 412 U.S. at 692 n.16; *New England Divisions Case*, 261 U.S. 184, 196-197 (1923); *United States* v. *Louisiana*, 290 U.S. 70, 76-77 (1933).

[29] The present case is thus quite unlike *Wichita* where the Commission had held definitively that the particular rates there at issue were just and reasonable. In fact, this Court in *Wichita* contrasted the order there involved with general revenue orders, observing that if the grain charge "were just like a general rate increase, serious questions would arise about the jurisdiction of the District Court to review the Commission's order." 412 U.S. at 814 n.10.

[30] See, *e.g.*, *Algoma Coke & Coal Co.* v. *United States*, 11 F. Supp. 487 (E.D. Va., 1935); *Koppers Co.* v. *United States*, 132 F. Supp. 159 (W.D. Pa. 1955); *Florida Citrus Comm'n* v. *United States*, 144 F. Supp. 517 (N.D. Fla. 1956), *aff'd mem.*, 352 U.S.

based upon sound policy considerations including an unwillingness of courts to interfere at what is merely an intermediate stage in the rate-making process, the availability of further remedies focusing upon individual rates, and the dangers of disruption and inconsistency that would result from review of general revenue orders. See pp. 32-33, below.

The rule is not only one of long standing but it was only recently reaffirmed by two three-judge panels in the lower court and a three-judge panel in the Southern District of New York (see p. 23, n.30 above),[31] and, in the instance most closely analogous to the present case, this Court unanimously affirmed the District Court. See pp. 30-32, below. Indeed, while the lower court expressed its disapproval of the rule, it nevertheless recognized its existence and for this reason explicitly rested its holding that it had jurisdiction on a supposed exception to the general rule, to which we now turn.

B. NEPA Does Not Create An Exception to the Rule That General Revenue Orders Are Unreviewable.

While recognizing the well-settled principle that general revenue orders are unreviewable, the lower court sought to avoid its thrust by contending that "*the existence of NEPA* requires us to reconsider the application of these doctrines and *in NEPA cases* to accept more of the broad jurisdictional authority

1021 (1957); *Atlantic City Elec. Co.* v. *United States*, 306 F. Supp. 338 (S.D.N.Y. 1969), and *Alabama Power Co.* v. *United States*, 316 F. Supp. 337 (D. D.C. 1969), *both aff'd by an equally divided Court*, 400 U.S. 73 (1970); *Electronic Industries Ass'n* v. *United States*, 310 F. Supp. 1286 (D. D.C. 1970), *aff'd mem.*, 401 U.S. 967 (1971).

[31] Of the nine judges involved, there was only one dissent—that of Judge Wright in the *Alabama Power* case, 316 F. Supp. at 339.

granted us." 371 F. Supp. at 1298 (Gov. J.S. 20a) (emphasis added). The lower court thus demonstrated an utter disregard for this Court's opinion in *United States* v. *SCRAP, supra,* which flatly rejected the argument that NEPA effected any change in pre-existing jurisdictional rules. In addition, even if the issue remains open to debate after *SCRAP,* it failed to provide any logical or persuasive reasons for finding in NEPA a basis for a jurisdictional exception.

The supposed NEPA "exception" perceived by the lower court is nothing other than a slight variation on a theme which the lower court adopted in the original *SCRAP* litigation and which this Court specifically rejected. There, the lower court, although conceding that *Arrow Transp. Co.* v. *Southern Ry.,* 372 U.S. 658 (1963), established a general rule against judicial intervention at the suspension stage, concluded that "NEPA implicitly confers authority" to grant such relief against any federal action "even if jurisdiction to review this action is otherwise lacking." 346 F. Supp. at 197.

On review in *SCRAP,* this Court unambiguously rejected the notion that NEPA *sub silentio* creates new jurisdictional standards affecting judicial review of ICC action. 412 U.S. at 692-98. This Court made it crystal clear that NEPA did not contemplate or justify any "wholesale overruling of prior law." 412 U.S. at 694. Yet, all of the lower court's arguments as to why a NEPA exception should be carved out of settled legal doctrine are based on an express assumption—that "*the existence of NEPA* requires us to reconsider the application of these doctrines and *in NEPA cases* to accept more of the broad jurisdictional authority granted us" (371 F. Supp. at 1298

(Gov. J.S. 20a) (emphasis added))—which flies in the face of this Court's opinion in *SCRAP*.

While the lower court claimed that this Court's analysis in *SCRAP* was narrowly confined to statutory limitations on the district courts' jurisdiction (371 F. Supp. at 1298 (Gov. J.S. 20a)), the broad language of the *SCRAP* opinion hardly lends itself to such a crabbed interpretation. *SCRAP* emphasized that nothing in NEPA or its legislative history reflected any congressional intent to alter the rule that courts may not "suspend" rates by injunction when the Commission has chosen not to do so or when the statutory suspension period has expired. 412 U.S. at 694-95. Similarly, nothing in NEPA or its legislative history bespeaks any intention to overturn the settled rule against judicial review either of suspension orders directed to individual rates or of general revenue orders directed to rates as a whole.

Finally, the Court in *SCRAP* stressed that the policies underlying the *Arrow* doctrine had the same application to NEPA cases as to cases involving more familiar types of attacks on railroad rates. 412 U.S. at 696-98. Here, it is no less true that the policies underlying the rule that general revenue orders are unreviewable apply to NEPA cases just as they apply to efforts to review general revenue orders on conventional grounds. See pp. 32-33, below. Indeed, the rule of unreviewability is itself closely related to the *Arrow* doctrine which this Court found to be unimpaired by NEPA.[32]

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[32] In *Arrow*, this Court in explaining why injunctive relief was precluded stated that "the same considerations" explained why the courts declined to review suspension orders and cited the leading cases on point. 372 U.S. at 670 & n.21. The principles underlying nonreviewability of suspension orders applicable to individual rates and general revenue orders applicable to all rates are the same.

The applicability of the general rule against reviewability is underscored by the attempts of the lower court to distinguish it. The court below gave two reasons for carving a "NEPA exception" out of the established rule that general revenue orders are unreviewable. Neither is persuasive.

First, the court argued that because "it is least questionable that environmental groups such as SCRAP have standing to initiate Section 13 proceedings during which they could attempt to contest the Commission's compliance with NEPA" (371 F. Supp. at 1297 (Gov. J.S. 17a)), such groups should "therefore" be able to challenge the Commission's general revenue orders. Since *SCRAP,* however, there is no reason to doubt that environmental groups such as SCRAP have standing to initiate Section 13 proceedings. As this Court held in *SCRAP,* Section 10 of the APA confers standing upon those who can show "that the challenged action had caused them 'injury in fact' where the alleged injury was to an interest 'arguably within the zone of interests to be protected or regulated' by the statutes that the agencies were claimed to have violated." 412 U.S. at 686, quoting *Sierra Club* v. *Morton,* 405 U.S. 727, 733 (1972). Here, as in *SCRAP,* it is not disputed that the "environmental interest" that the appellees claim to protect is within the zone of protected interests (412 U.S. at 686 n.13) and, as for injury in fact, *SCRAP* held that appellees' allegations were adequate to confer standing to complain of rate increases on recyclables (*id.* at 690).[33]

[33] Although the lower court characterizes this conclusion as "speculative" and "unrealistic," (371 F. Supp. at 1297 (Gov. J.S. 17a)), it gives no reason for supposing that the standing of environmental groups established in *SCRAP* is any less secure

Even assuming that the lower court was correct in its contention that environmental groups may lack standing to challenge the Commission's action in a Section 13 proceeding, it does not follow that NEPA creates an exception to the principle that general revenue orders are not subject to judicial review. Rather, if standing is lacking in Section 13 proceedings, the logical implication would be that environmental groups are equally lacking in standing to challenge general revenue orders. There is nothing in the *Sierra Club* or *SCRAP* decisions to suggest that the criteria for standing to challenge agency action under NEPA differ according to whether a general revenue order or a specific tariff is under attack.[34]

Second, the lower court in creating a "NEPA exception" relied upon the purported inadequacy of a Section 13 proceeding to achieve the purposes of NEPA. The court first argued that unless review of the Commission's general revenue orders were permitted, it would not be possible "to consider whether the rate increases on recyclables collectively have a significant environmental impact." 371 F. Supp. at 1297 (Gov. J.S. 18a).[35] However, quite plainly it is only

when the environmental claims are directed to particular rates on recyclables rather than to recyclables rates *en masse*. Indeed, if there were any proceeding in which environmental groups might purport to show environmental injury in fact, it would be in Section 13 proceedings focusing upon particular rates.

[34] It is certainly far more logical to conclude that standing in a general revenue proceeding implies standing in a Section 13 proceeding than to argue that a lack of standing in a Section 13 proceeding should be remedied by altering a long-standing rule involving *reviewability* of general revenue orders.

[35] Complaint proceedings under Sections 13 and 15 may, of course, consider a substantial number of rates in a given area in a single proceeding. See, *e.g.*, *Institute of Scrap Iron & Steel* v. *Akron, C. & Y.R.R.*, 316 I.C.C. 55 (1962).

by first considering whether particular rates on particular recyclable commodities will have an impact on the environment that one can even approach the question whether all the rates, considered as a whole, will have such an effect.[36]

The lower court further contended that even if a Section 13 proceeding could resolve NEPA claims, the investigation into rates on individual commodities would produce "burdensome relitigation of each particular rate" causing a delay in the ultimate resolution of the environmental issues with the possibility that irreparable damage would be done to the environment in the interim. 371 F. Supp. at 1298 (Gov. J.S. 19a). On the contrary, since a general revenue proceeding is only an intermediate stage in the rate-making process which does not determine the justness or reasonableness of any particular rate, it is impossible to reach any definitive conclusion in that proceeding on what rate levels should be.[37] Judicial review at this stage of the rate-making process merely serves to postpone the inquiry into particular rates and thus delay the final determination whether such rates are in fact just and reasonable, taking into account all factors including environmental ones.

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[36] Not only did the ICC give separate treatment in its impact statement to individual commodities and commodity groups, but the lower court itself—in specifying the additional studies it deemed necessary—stressed that they should be done on a commodity by commodity basis. *E.g.*, 371 F. Supp. at 1303 (Gov. J.S. 32a).

[37] Just as a complainant is free to begin a Section 13 proceeding if rates are raised in a general revenue proceeding, so the carrier is free to file individual rate increases on those commodities following the general revenue proceeding where increases were not instituted.

C. The Well Settled Rule That General Revenue Orders Are Unreviewable Is Sound and Where As Here No Challenge Is Made to the Railroads' Revenue Needs, the Rule Has Been Unanimously Sustained by This Court.

As noted above, for almost four decades it has been well established in the lower federal courts that general revenue orders are not reviewable. For this reason the court below explicitly rested its decision on a supposed "NEPA exception" to the settled rule. Nevertheless, Judge Wright took some pains to express his disagreement with the prevailing rule (371 F. Supp. at 1296-97 (Gov. J.S. 15a-19a)), reiterating views expressed in his dissent in *Alabama Power Co.* v. *United States, supra,* 316 F. Supp. at 339-40.

Just four Terms ago, this Court left standing three lower court decisions which reaffirmed the rule that general revenue orders are unreviewable. In *Atlantic City Electric Co.* v. *United States,* 306 F. Supp. 338 (S.D.N.Y. 1969) and *Alabama Power Co.* v. *United States,* 316 F. Supp. 337 (D. D.C. 1969), the Court divided evenly in sustaining the lower courts' dismissal of such suits. 400 U.S. 73 (1970). More importantly, later in the same Term that *Atlantic City* and *Alabama Power* were decided, the Court unanimously affirmed a similar decision of the District Court in *Electronic Industries Ass'n* v. *United States,* 310 F. Supp. 1286 (D.D.C. 1970), *aff'd mem.,* 401 U.S. 967 (1971). The difference between the decisions is significant here because the present case is squarely governed by *Electronic Industries.*

In the first two cases, the attacks were directed at the ICC's findings relating to railroad revenue needs, findings which had no relationship to particular types of rates and which in fact cut across all rate categories.

In the *Electronic Industries* case, however, the attack was directed not to revenue-need findings but to the application of the general increase to particular categories of rates.[38] This is precisely the situation in the instant case: Here, the appellees' claims concern the Commission's treatment of particular categories of rates applicable to recyclable commodities, just as the claims in *Electronic Industries* concerned the Commission's treatment of categories of rates applicable to electrical products.

As the District Court in *Electronic Industries* reasoned:

> "[T]he plaintiff's whole complaint boils down to an assertion that the increase in rates for shipping electrical products is discriminatorily high and without a rational cost basis. Its claim is clearly a subject for §§ 13 and 15 of 49 U.S.C. Thus, plaintiff's attack here is premature; it must first exhaust its appropriate administrative remedies." 310 F. Supp. at 1289.

The statement is equally applicable to the increases in rates on recyclables here at issue. Since this Court unanimously affirmed the District Court's decision in *Electronic Industries,* which presented a situation similar to the instant case, it is apparent that there can be no review of the Commission's orders in this case.

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[38] It seems apparent that this distinction between *Alabama Power* and *Atlantic City* on the one hand and *Electronic Industries* on the other explains the Court's unanimous affirmance in the latter case. Thus, the United States and the Commission, although in disagreement about other aspects of the earlier two cases, both agreed that attacks on general revenue orders were not reviewable insofar as they challenged the Commission's treatment of the rates on particular commodities and that *Electronic Industries* was governed by this principle.

The lower court attempted to avoid the force of this Court's unanimous affirmance in *Electronic Industries* by contending that the shippers there attacked "only that portion of a Commission § 15(7) order permitting increased rates on two particular items" (371 F. Supp. at 1297 n.18 (Gov. J.S. 16a n.18)). The suggested distinction is without substance. In fact, as indicated above, the shippers in *Electronic Industries* were attacking increases in rate categories in which they were interested, namely, rates on radio and television sets and electronic components or accessories, just as appellees here are attacking increases in rate categories in which they are interested, namely, various recyclable commodities such as iron and steel scrap, scrap glass, and textile scrap.[39]

Electronic Industries, we submit, is dispositive of this case and makes it unnecessary for the Court to consider here the different question raised by *Atlantic City* and *Alabama Power*—whether the general rule against reviewability should continue to apply to attacks on general revenue findings, findings which have no relationship to particular rate categories. If, however, the Court does not agree, then we believe the general rule should itself be reaffirmed. Indeed, consideration of the main reasons for the general rule reinforces the railroads' basic jurisdictional argument in this case.

The central point is that ultimately no one—shipper or environmentalist—has any right to have rates charged below a just and reasonable level, and there can be no resolution of this issue short of a proceeding

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[39] Rates on electronic components and radio and television sets are, like rates on scrap iron or glass, broad categories encompassing many different rates between different points.

such as a Section 13 case in which the rates on particular commodities between specific points are finally set, in light of all relevant considerations including environmental considerations. To allow review of general revenue orders is thus scarcely different than allowing review of ordinary suspension orders or any other interlocutory orders entered in ICC proceedings. Such review violates settled principles of exhaustion of remedies and finality; it multiplies litigation in the courts to no purpose; it delays final resolution of the ultimate question of justness and reasonableness; and it presents the same risk of premature impact upon and influence of the administrative process deprecated by this Court in *Wichita*.

In addition, a decision permitting review of general revenue orders would have a devastating effect upon the railroads. If shippers, environmentalists and other interested parties were routinely to seek judicial review of the Commission's general revenue orders, they would certainly seek to prevent the implementation of the railroad rates in issue. The railroads would thus be confronted with the threat of injunctions from district courts in different parts of the country preventing them from collecting rates at different intermediate stages of the rate-making process—a prospect that would seriously aggravate their already precarious financial situation.

Finally, the rule that general revenue orders are unreviewable is one of long standing which has been left untouched by Congress in major revisions of the Interstate Commerce Act. The rule is closely allied to the settled principle, emphasized in *Arrow* and reaffirmed in *SCRAP*, that the initial timing of rate changes is entrusted to the Commission even though

ultimately any determination that a rate is or is not just and reasonable is reviewable in the courts. If changes are to be made in this long standing rule which is a central element in the Act, then in the absence of the most exigent circumstances such a change should come from Congress.

II. THE LOWER COURT ERRED IN HOLDING THAT THE COMMISSION'S IMPACT STATEMENT WAS INADEQUATE BECAUSE THE COURT DISAGREED WITH THE COMMISSION'S SUBSTANTIVE DETERMINATIONS.

In this proceeding the ICC prepared an elaborate environmental impact statement of almost 200 pages which manifestly gave searching consideration to the environmental issues allegedly raised by the rate increase and discussed each of the substantive issues specified by NEPA. Accordingly, the agency satisfied its statutory obligation to prepare an impact statement and the lower court was not entitled to set the impact statement aside because it disagreed with the agency's tone or substantive judgments. Alternatively, even if the agency's substantive analysis were open to judicial review, its analysis here was reasoned, informed, and within the permissible bounds of agency expertise, and the lower court exceeded the limits of judicial review in setting it aside or seeking to dictate the outcome of further agency proceedings.

A. The Commission Clearly Gave Environmental Issues the "Hard Look" Required by NEPA.

In imposing the duty on all federal agencies to prepare, in connection with any major federal action significantly affecting the quality of the human environment, a detailed environmental impact statement and to consult with other federal agencies with expertise in the environmental area before making the statement, Congress sought to assure that the decision-

making process within the federal agencies would give consideration to the possible environmental consequences of their proposed actions.[40] NEPA's impact statement procedure was thus designed to assure that the agency would take a careful look at the possible environmental consequences of its action but *not* to dictate the particular result to be reached by the agency.[41] In "requiring all federal agencies to consider values of environmental preservation in their spheres of activity," *Calvert Cliffs' Coordinating Committee, Inc.* v. *AEC,* 449 F.2d 1109, 1111 (D.C. Cir. 1971), Congress placed the basic obligation upon the federal agencies to consider and evaluate the environmental consequences of their proposed actions within their areas of operation and expertise.[42]

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[40] *Hearings on S. 1075, S. 237 and S. 1752 Before the U. S. Senate Committee on Interior and Insular Affairs,* 91st Cong., 1st Sess. 24-34 (1969).

[41] As the court stated in *Scenic Hudson Preservation Conf.* v. *FPC,* 453 F.2d 463, 481 (2d Cir. 1971), *cert. denied,* 407 U.S. 926 (1972): "the Act does not require that a particular decision be reached but only that all factors be fully explored. The eventual decision still remains the duty of the responsible agency." See also *Jicarilla Apache Tribe of Indians* v. *Morton,* 471 F.2d 1275 (9th Cir. 1973); *Monroe County Conservation Council* v. *Volpe,* 472 F.2d 693 (2d Cir. 1972); *Committee To Stop Route 7* v. *Volpe,* 346 F. Supp. 731 (D. Conn. 1972).

[42] This Court recognized in *SCRAP* itself that the "federal agencies . . . have the primary responsibility for the implementation of NEPA." *United States* v. *SCRAP, supra,* 412 U.S. at 694. Similarly, the Council on Environmental Quality stated in guidelines issued for federal agencies on compliance with NEPA: "The objective of section 102(2)(C) of the Act and of these guidelines is *to build into the agency decision making process* an appropriate and careful consideration of the environmental aspects of the proposed action . . ." 36 Fed. Reg. 7724 (April 23, 1971) (emphasis supplied).

Consonantly, the courts in repeated, well reasoned decisions have recognized that judicial review of impact statements is quite limited.[43] So far as the content of impact statements is concerned, the function of the courts is simply to ensure that the environmental effects of a proposed action are given detailed consideration by the decision-maker. *Cape Henry Bird Club v. Laird,* 359 F. Supp. 404 (W.D. Va.), *aff'd per curiam,* 484 F.2d 453 (4th Cir. 1973). Once "the officials or agencies have taken the 'hard look' at environmental consequences mandated by Congress," a court must not "inject itself within the area of discretion of the executive as to the choice of action to be taken." *National Resources Defense Council* v. *Morton, supra,* 458 F.2d at 838. *City of New York* v. *United States, supra,* 344 F. Supp. at 940 n.17.

Judged in this framework, the impact statement in this case clearly constituted the "detailed statement" required by Section 102(2)(C) on the alleged environmental impact of the proposed action. In 150 pages of analysis, it addressed each of the related topics specified in the statute.[44] The final statement was issued

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[43] See, *e.g., EDF* v. *Corps of Engineers,* 470 F.2d 289 (8th Cir. 1972), *cert. denied,* 412 U.S. 931 (1973); *EDF* v. *Froehlke,* 473 F.2d 346 (8th Cir. 1972); *City of New York* v. *United States,* 344 F. Supp. 929 (E.D.N.Y. 1972) (ICC Impact Statement)); *National Resources Defense Council* v. *Morton,* 458 F.2d 827 (D.C. Cir. 1972); *National Helium Corp.* v. *Morton,* 486 F.2d 995 (10th Cir. 1973), *cert. denied,* 416 U.S. 993 (1974).

[44] These are whether there would be any unavoidable adverse environmental effects as a result of its action; alternatives to the proposed action; the relationship between local short-term use of man's environment and the maintenance and enhancement of long-term productivity; and the irreversible and irretrievable commitments of resources which would be involved in the proposed action were it implemented.

only after the ICC received and reviewed comments on the draft statement obtained not only from other federal agencies, but also from the public at large including the appellees. See p. 9, above. We submit that even the briefest perusal of the statement refutes any suggestion that it was perfunctory, feigned, or pro forma in its examination.

Instead of evaluating the impact statement in terms of whether the Commission had given detailed consideration to all the factors mandated by NEPA, the standard correctly employed by the dissenting opinion below (371 F. Supp. at 1312 (Gov. J.S. 56a)), the lower court embarked upon an unwarranted, *de novo* consideration of the very questions which NEPA confided to the agency decision-making process. For example, the court objected because the Commission chose to rely on one type of study rather than another. 371 F. Supp. at 1303 (Gov. J.S. 31a-32a).[45] It argued that the impact statement did not specifically respond to one or another of the many different points and studies considered in the voluminous proceeding. *Id.* at 1303 (Gov. J.S. 33a-34a). It asserted inaccurately that the Commission limited itself exclusively to the environmental effects of the rate increase in question and failed to address the alleged underlying discrimination against recyclables in the existing freight rate structure. *Id.* at 1303-04 (Gov. J.S. 34a-35a). These

[45] The court said, for instance, that "the statement does not offer any rigorous price sensitivity studies of its own" but "relies on general discussions of past scrap demand trends" and on "the concurrence of past scrap demand and rate increases." *Id.* And the court indicated its preference for a "study of the contribution to costs made by each category of recyclable commodities and the primary goods with which they compete." *Id.* at 1306 (Gov. J.S. 41a). These and other criticisms are addressed on their merits at pp. 41-48, below.

attacks are directed at the Commission's consideration and evaluation of particular facts, the inferences the Commission has drawn, and the judgments it has made in the course of its careful examination of the environmental issues raised by its proposed action.

Other criticisms of the court, while phrased in more general terms, similarly comprise nothing more than disagreement with the Commission's substantive determinations. For example, the court complained about the statement's "language and style" as reflecting the Commission's insensitivity to environmental values. It said that the ICC appeared to find no merit in environmental arguments against the rate increase and adopted none of those arguments "as worthy of even partial acceptance." *Id.* at 1302 (Gov. J.S. 29a-30a). And it took the Commission to ask for "failure to alter its draft impact statement" in response to the comments of other agencies and parties to the proceeding having special environmental interests. *Id.* at 1302 (Gov. J.S. 31a). Such assertions show that the District Court has not in any sense confined itself to enforcing "procedural" requirements of NEPA, as the opinion claims, but has thrust itself directly into the substantive decision-making properly confided to the agency.

We do not believe that this Court needs to reach and weigh each of the individual criticisms the lower court made of the impact statement—or our showing below that those criticisms were logically and factually unsound—in order to hold that the impact statement met the requirements of NEPA. Whatever may be the merits of the criticisms, the essential point is that they were not part of the judicial function under NEPA. Under a proper interpretation of the law, an impact statement should be found inadequate only if

the agency has failed to follow the procedures established by NEPA or has failed to provide a detailed statement considering the possible environmental consequences of its action. *Scenic Hudson Preservation Conf.* v. *FPC, supra,* 453 F.2d at 481.

This principle of judicial review is implicit in NEPA's statutory provision requiring impact statements which, as we have shown, was framed to require evidence that the agency had considered environmental consequences and not to dictate the result reached by the agency. See pp. 34-36, above. Nothing in NEPA's language or its legislative history warrants or even suggests the conclusion that Congress intended the federal courts to weigh, balance, re-evaluate or otherwise revise the substance of the agency's determinations. Had Congress intended the courts to play such a role, it would not have failed to make clear its intention in NEPA or its legislative history.

Moreover, there are sound policy reasons for avoiding such judicial intervention. Federal courts have neither the time nor the capacity to function as environmental supervisors for the thousands of federal actions in this country which may affect the environment. Indeed, the very absence of any statutory standards for judicial review and the great variety of actions for which NEPA statements may be required would make it virtually impossible to assure prompt or uniform treatment if the federal courts undertook this supervisory role.[46] The only result of substantive

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[46] NEPA is not, of course, limited to agency actions but includes by its express terms "every recommendation or report on proposals for legislation" and has been held to embrace executive branch actions as diverse as the construction of a jailhouse in New York City and the conduct of military maneuvers and weapons testing.

judicial review would be inconsistent determinations, extensive delay of vital projects and an invitation to judges to use their personal predilections to determine whether agencies or federal departments have "adequately" justified the balance struck between environmental considerations and other important national interests.[47]

Finally, it is notable that the best reasoned decisions of the lower federal courts have, once an impact statement has been prepared, rejected attempts to enmesh the courts in a substantive review of the agency's detailed determinations. These decisions include opinions of Judge Friendly in the Second Circuit,[48] and Judge Doyle of the Tenth Circuit.[49] To be sure, some opinions

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[47] The factor of delay becomes especially important if substantive review is allowed. It is one thing to insist that the agency prepare the detailed impact statement discussing each of the issues specified by NEPA. It is quite another to open up a vista of virtually endless delays while an agency re-writes its impact statement, possibly time and time again, to meet substantive objections the reviewing court may perceive each time the impact statement is brought before it.

[48] *City of New York* v. *United States*, 344 F. Supp. 929 (E.D. N.Y. 1972) (three-judge district court). There, Judge Friendly, after having required that an impact statement be prepared in connection with a railroad abandonment alleged to increase the amount of truck traffic and consequent air pollution (337 F.Supp. 150), was equally firm in refusing to substitute the court's judgment for that of the ICC.

[49] *National Helium Corp.* v. *Morton*, 486 F.2d 995 (10th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974). There, the court specifically rejected the trial court's attempt to evaluate the impact statement's environmental determinations by an "arbitrary and capricious" standard (*id.* at 1002 n.5) and in substance concluded that an impact statement which gave detailed and reasonable attention to the subtopics required by NEPA should be sustained. *Id.* at 1002-03.

—notably two opinions by Judge Wright—take the view that substantive determinations in impact statements are open to review to a greater or lesser degree.[50] However, we believe the opinion below in the present case is itself the best evidence why such review is unwarranted.

If this Court holds that the extensive and thoroughly considered impact statement prepared in this case can be thrown out either on the basis of a court's criticisms of the statement's "language and style" (371 F. Supp. at 1302 (Gov. J.S. 29a)), or, alternatively, on a court's substantive disagreement with the agency's "failure to alter its draft impact statement in response to . . . critical comments" (*id.* at 1302 (Gov. J.S. 31a)), it will have ushered in a new era of judicial intervention in the administrative process which finds no justification in the statute and which flies in the face of the well established policies regarding the appropriate division of functions between courts and agencies.

B. Assuming Arguendo That the Lower Court Was Entitled To Review the Merits of the Commission's Impact Statement, Its Criticisms Are Ill-Founded and Far Exceeded the Permissible Scope of Review.

It is important to appreciate, at the outset, that an across-the-board increase in railroad rates—affecting allegedly competing products as well as recyclables—has a relationship to the environment that is at best speculative, diffuse, and open-ended.[51] There is virtual-

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[50] See the opinion below and *Calvert Cliffs' Coordinating Committee* v. *AEC*, 449 F.2d 1109 (D. C. Cir. 1971).

[51] Mr. Chief Justice Burger made this clear in his opinion on the railroads' initial stay application in the first *SCRAP* case, where he described the "projected chain of events" which would have to occur in order for the rate increase to produce any environmental

ly no limit to the number of examples, studies, possibilities, and analyses that could be demanded by the lower court; and the more the agency says, the more it can be criticized in one aspect or another for what it has said or for not taking one step more.

Against this background, the criticisms the lower court did make were so unpersuasive as virtually to confirm that the ICC did prepare a reasonable and sufficient impact statement. Even assuming that the lower court was entitled to engage in some degree of substantive review of the Commission's impact statement, the court's criticisms were logically unsound, rested upon inaccurate descriptions of what the Commission said and did, and exceeded even the most generous conception of the proper scope of review of impact statements.

The lower court's initial attack was launched at the "defensive and advocatory language and style" (371 F. Supp. at 1302 (Gov. J.S. 29a)) in which the statement was purportedly written. In fact, the court selected from over 150 pages of analysis a few isolated phrases or comments which seem to have offended its standards of stylistic or linguistic propriety—standards which few judicial decisions including the lower court's own opinion would or should seek to follow.[52] A fair consideration of the impact statement and its

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impact. 409 U.S. at 1217. The main premise in the chain—the alleged existence of discrimination against recyclables in the rate structure—is one of the claims the ICC treated in great detail and squarely rejected.

[52] Neither court nor agency should be obliged to pay feigned respect to arguments that are frivolous or disingenuous. If such arguments are "one-dimensional" or "naive"—as certain of them clearly were in this instance (see, *e.g.*, pp. 10-11, above)—the agency is quite entitled to say so.

contents demonstrates that it consistently sought to maintain a balanced approach to the issues before it.

Despite its own extensive treatment of environmental issues in its prior October 4 report, the ICC acceded to the request of CEQ and EPA and undertook to prepare an environmental impact statement, including both the collection of further information to supplement the record and circulation of a draft impact statement.[53] From the outset of its final statement the Commission recognized the obligations NEPA imposed upon it "to assess in detail the potential environmental impact of a considered course of action in order that adverse effects may be avoided, and the environmental quality restored or enhanced, to the fullest extent practicable," and it undertook to conduct its analysis "[i]n this spirit." 346 I.C.C. at 98 (A. 20). The Commission then undertook an extensive discussion touching upon each of the major claims of environmental harm and a vast array of evidence.[54]

Moreover, assuming that there was some basis for criticizing the statement's language or style, this is clearly not the type of consideration which falls within the cognizance of a reviewing court, however broad one may reasonably contend such review should be in

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[53] The October 4 report contained a reasoned explanation of the ICC's conclusion that the rate increases did not have a significant impact on the environment; and accordingly, the ICC was not obliged to prepare an impact statement at all. See, *e.g.*, *Citizens for Reid State Park* v. *Laird*, 336 F. Supp. 783 (D. Me. 1972).

[54] For the future, the Commission looked to the possible design of incentive rates to facilitate the movement of recyclables (346 I.C.C. at 223 (A. 145)), a clear indication of the Commission's continuing concern with environmental considerations; and it made clear its intent to give further attention to discrimination charges and other environmental claims in *Ex Parte No. 270*.

regard to impact statements. It hardly needs to be pointed out that there is no statutory authority or judicial precedent justifying a federal court in acting as a literary review board for federal agencies. To sanction such a judicial role would merely lead to disruption of the administrative process by encouraging agencies to conceal or misstate their actual views.

The lower court's second line of attack on the Commission's impact statement relates to the Commission's "failure to alter its draft impact statement" (371 F. Supp. at 1302 (Gov. J.S. 31a)) in response to the comments of interested parties and agencies, in general, and in response to four comments in particular. However, the contentions to which the court referred are simply particular arguments that the rate changes will adversely affect the environment or demands for still further studies or analyses. Since the Commission believed that the record amply showed that there would be no impact, the lower court's criticism is merely a roundabout way of saying that the Commission was required to alter the result it reached after a full consideration of the environmental facts and issues before it.

Even under the most expansive standards of judicial review, the agency's determinations cannot be rejected at large and in the abstract. The Commission's determinations here rested upon a reasoned analysis of the evidence and contentions and fell well within the bounds of permissible agency discretion. If one examines the specific objections raised by the court to the Commission's analysis, it becomes apparent that they are without basis.

The lower court expressed concern over the alleged failure of the Commission to "offer any price sensi-

tivity studies of its own" (371 F. Supp. at 1303 (Gov. J.S. 31a)), in light of the recommendation of two Government agencies that "a quantitative and thorough economic study be made on the responsiveness of the demand for secondary materials to changes in transportation costs." 371 F. Supp. at 1302 (Gov. J.S. 31a). But in fact, the Commission did consider extensive evidence bearing on responsiveness,[55] and it expressly stated its conclusions with respect to individual recyclables.[56] It did not undertake the particular type of study suggested because in its expert judgment other evidence showed that price and volume of usage did not vary significantly in proportion to freight rate changes of the type and magnitude here involved and thus the "artificial and theoretical" study of the kind urged upon it by the court was totally unnecessary. 346 I.C.C. at 138 n.16 (A. 60). This is the type of expert judgment that lies peculiarly within the discretion

[55] This evidence included statistics relating to increased rail movement of recyclables and actual experience of the railroads in handling recyclables during the 2.5 percent surcharge and before and after earlier increases (*e.g.*, 346 I.C.C. at 141, 147, 171-72, 180, 184-85, 198, 270-71 (A. 63, 69, 93-94, 102, 106-07, 120, 192-93)); consideration of the pricing and demand patterns of recyclables (*e.g.*, *id.* at 126, 167-69, 207 (A. 48, 89-91, 129)); the technological constraints on demand for them and non-price legal or practical limitations on use of recyclables (*e.g.*, *id.* at 147, 150, 165-66, 170-71, 178-79, 182, 185, 186, 202-03 (A. 69, 72, 87-88, 92-93, 100-01, 104, 107, 108, 124-25)); and the limited size of the increases here contrasted with equal or larger increases on alleged competing raw materials (*e.g.*, *id.* at 159, 194, 198 (A. 81, 116, 120)).

[56] See, *e.g.*, 346 I.C.C. at 175 (A. 97) (increased freight rates will not affect movement of paper scrap); *id.* at 182 (A. 104) (rail rates of quite limited importance to textile scrap); *id.* at 187 (A. 109) (freight rate increase on scrap glass could affect only a fraction of market at most); *id.* at 209 (A. 131) (railroad freight rates of minimal importance in recycling plastics); *id.* at 198 (A. 120) (rate increase wll have no effect on recycling of nonferrous scrap metal).

of the agency responsible for preparing an impact statement.[57]

The court also took the Commission to task for failure to provide a "comprehensive alternative analysis of the relative cost contribution of secondary and primary materials." 371 F. Supp. at 1303 (Gov. J.S. 33a). But the court itself recognized that such a study would be relevant only "*if* the transportation costs do affect the demand for recyclable commodities." *Id.* (emphasis supplied). Since the Commission concluded on the basis of its considered evaluation of the evidence that rate changes of the present size do not significantly affect the demand for recyclables, there was clearly no reason for the Commission to undertake such a study. In any event, the Commission did, indeed, consider claims that recyclables were contributing excessively to the railroads' revenue needs and discovered that, from the standpoint of cost contribution, the evidence indicated the contrary.[58]

The lower court's third specific criticism leveled at the Commission's impact statement has no more merit than the first two. The court chided the Commission for "failing to consider the impact of the rate increase on long term investment in facilities which can make

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[57] Claims that rail rate increases will cause diversion or discontinuance of traffic are, of course, virtually a staple contention in ICC rate proceedings, and the Commission has been evaluating such claims with respect to recyclable and nonrecyclable commodities for decades. See p. 57, n.69, below.

[58] For example, sample evidence showed, as earlier noted, that the profit on carriage of iron and steel scrap was less than that on iron ore even though the costs on the latter were generally lower. See p. 11, above. Rates on textile wastes in certain instances did not even cover the railroads' costs (346 I.C.C. at 182 (A. 104)). Incentive or volume rates existed for certain recyclables (*id.* at 170, 196 (A. 92, 118)).

fuller productive use of recyclables." 371 F. Supp. at 1303 (Gov. J.S. 33a). But it is difficult to see what relevance such an inquiry would have when the evidence is overwhelming that the freight rate increases on recyclables here in question have no significant impact on their demand. To be sure, the court time and again reiterates its strenuous disagreement with the Commission's evidentiary conclusion, but the Commission's judgment on that issue was supported by detailed reasoning and extensive evidence. See p. 45, nn.55 & 56, above.

The lower court's final objection to the Commission's impact statement, which it characterized as the "most fundamental and important deficiency" (371 F. Supp. at 1303-04 (Gov. J.S. 34a)), was the alleged limitation of the Commission's analysis "to the marginal impact of the most recent rate increase with no discussion of whether the underlying rate structure itself significantly affects the environment." *Id.* But the court's criticism ignores both what the Commission actually did as well as what it was obliged to do under NEPA. First, it was entirely proper for the Commission to devote principal attention to the particular federal "action" under consideration—which involved the general increases on recyclables—since this focus is what NEPA's language clearly contemplates. Second, the Commission did in fact consider the overall rate structure both in evaluating the cumulative impact of the particular rate change here involved together with prior rate changes,[59] and in discussing charges that

[59] The Commission in fact expressly stated, in concluding that the increases here at issue would not deter recycling, that "we have explored . . . the cumulative effects that past freight rate increases and the proposed increases have had and are likely to have . . . ." 346 I.C.C. at 134 n.15 (A. 56).

the freight rate structure discriminated against recyclables.[60] Finally, in considering the attention due to this broader subject, the Commission properly referred to its broad proceeding in *Ex Parte No. 270* which is currently considering various aspects of the railroad freight rate structure including its relationship to environmental interests. *American Lines* v. *Louisville & N.R.R.*, 392 U.S. 571, 590-91 (1968).

In summary, the lower court's criticisms of the Commission's impact statement are fatally defective on two counts: they represent an unwarranted substitution of the judgment of a court for that of the agency on matters properly within its province, such as the phrasing of its report, its choice of analyses, and its evaluation of evidence, an approach that clearly violates even the most generous conception of the scope of judicial review of impact statements; in addition, the criticisms themselves are ill-founded—based on a misconception of what the Commission actually did or was required to do under NEPA. If the present impact statement does not meet the requirements of NEPA, it is difficult to believe that any impact statement could ever do so.

C. Assuming Arguendo That the District Court Had Some Basis for Overturning the Commission's Impact Statement, the Terms of Its Remand Exceeded Its Authority.

Finally, even if the lower court did have some basis for overturning the ICC's impact statement, it certainly was not entitled to prescribe and dictate how the ICC should handle the case on remand. The deci-

[60] The Commission's analysis indicated that, on the contrary, it is nonrecyclables which are bearing a heavier share of the costs. See p. 11, above.

sion patently usurps the agency's function by its detailed directions to the ICC specifying what arguments, evidence or procedures may or may not be utilized in the remanded proceeding.

Thus, the court instructed the agency what types of analyses and studies it must make and include in its new impact statement (371 F. Supp. at 1302-03, 1306 (Gov. J.S. 31a-34a)); it told it what kind of arguments it may not ignore (*id.* at 1303-04 (Gov. J.S. 34a-36a)); it determined the scope of the study including a direction to study in depth the underlying rate structure (*id.* at 1304-05 (Gov. J.S. 36a)); and it prescribed procedural steps that find no support whatever in NEPA itself (*id.* at 1306-07 (Gov. J.S. 39a-43a)). See also pp. 51-56, below. Indeed, the court's opinion in effect advised the ICC that it must reach a different result in the remanded proceeding. For example, it condemned the impact statement because it did not adopt at least some of the environmental arguments (371 F. Supp. at 1302 (Gov. J.S. 31a)) and some of the specific agency criticisms (*id.* at 1302-04 (Gov. J.S. 31a-34a)). See also pp. 41-48, above.

The lower court's action in this regard not only confirms that it has substituted its own substantive views for those of the agency but represents independent legal error. It has long been settled that the courts will not direct an administrative agency how to exercise the discretion reposed in it by Congress or dictate the content of the decision that the agency may make in the exercise of that discretion.[61] On judicial

[61] *United States ex rel. Chicago, G.W. R.R. v. ICC*, 294 U.S. 50, 60 (1935); *ICC* v. *United States ex rel. Waste Merchants Ass'n*, 260 U.S. 32, 34 (1922); *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 317-18 (1958); *North Carolina Natural Gas Corp.* v. *United States*, 200 F. Supp. 745, 752 (D. Del. 1961).

review the court's function is simply to lay bare any legal error committed by the agency (*FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952)), and it is improper for the reviewing court to impose in its remand limitations on the way in which the agency shall exercise its judgment. *Id.*; *Arrow Transp. Co.* v. *Cincinnati, N.O. & T.P. Ry.*, 379 U.S. 642 (1965).

It is worth noting that the remanded proceeding as conceived by the lower court appears to require studies so numerous, extensive and detailed that it is doubtful that it could be accomplished without years of work and vast expenditures of time and money. However that may be, it is not the lower court's function to decide this question. If, contrary to the railroads' prior argument, this Court does hold the lower court properly reviewed the substance of the impact statement and correctly found it deficient, nevertheless the lower court's attempt to control the course of future proceedings should be set aside.

III. THE COMMISSION DID NOT COMMIT PROCEDURAL ERROR IN PREPARING ITS IMPACT STATEMENT.

Although most of the lower court's criticisms of the Commission's impact statement represented substantive disagreements with the Commission's conclusions, the court also contended that the Commission committed two procedural errors in the course of its preparation of the impact statement. The court asserted that the Commission erred both in failing "to start over again" to reconsider its approval of the rate increases on recyclables after evaluating the alleged environmental impact of such increases (371 F. Supp. at 1299-1300 (Gov. J.S. 23a-26a)), and in failing to issue an impact statement prior to a "hearing." 371 F. Supp. at 1300 (Gov. J.S. 25a-26a). Neither criticism is justi-

fied and further proceedings would serve no useful purpose.

A. The Court's Complaint That the Commission Failed to "Start Over Again" Is Irrational.

The principal criticism made by the court of the procedures the Commission followed in the preparation of its impact statement was that the Commission, in undertaking its comprehensive study, did not "start over again" but instead "merely reopened *Ex Parte No. 281* 'for the limited purpose of further evaluating . . . the environmental effects of increased railroad freight rates and charges' on the movement of recyclable commodities," through the impact statement procedure. 371 F. Supp. at 1299 (Gov. J.S. 23a). The opinion asserts that "the Commission thus indicated that it had already made its decision and all that remained was to determine if the environmental effects of that decision could be justified." *Id.*

The thrust of the lower court's argument seems to be that, in failing to reconsider its October 4 report, the Commission made "no attempt to integrate the considerations of national transportation policy justifying the rate increase with the environmental considerations analyzed in the impact statement." *Id.* at 1299 (Gov. J.S. 23a). In light of the fact that the Commission determined, after a thorough investigation including preparation of an impact statement, that the increases on recyclables would have *no* significant adverse impact on the environment, the lower court's suggestion that the Commission should nevertheless have started the entire proceeding over again makes no sense. The impact statement reached the same conclusion on environmental effects that had been reached

by the October 4 report and that had served as a premise for its determinations. Since the premise was confirmed, obviously there was no basis for altering the conclusions reached earlier.[62]

If the Commission had concluded that the increases in rates on recyclables in question would have a significant adverse impact on the environment, it might reasonably follow that the October 4 decision would have to be reopened. In those circumstances, the Commission might have had in some sense to "start over" and weigh the environmental impact against the railroads' need for revenue, the burden of making other shippers bear costs attributable to recyclables, and similar considerations. That, however, is not this case.

There is nothing in NEPA or the case law interpreting it to suggest that when an agency concludes that its action will have no environmental impact it must nevertheless rewrite its administrative decision over again to ensure full consideration of this datum. Nor is there any sound reason in policy for such an empty gesture. It is impossible to discern how any prejudice could possibly have resulted from the Commission's action.

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[62] This seems so plain that it is difficult to conceive what the lower court meant in complaining that the Commission's order of May 7, 1973, adopting the impact statement and discontinuing the proceeding "is further evidence that the Commission neither intended to give nor actually gave full reconsideration to the question of the recyclable rate increase. That one-sentence order merely adopts the entire staff-prepared impact statement." 371 F. Supp. at 1299 (Gov. J.S. 23a)). The Commission clearly said everything it had to say about environmental issues in the impact statement and, in light of its conclusion, nothing else had to be said to alter its earlier conclusions on other issues.

B. NEPA Does Not Require That An Agency Issue Its Impact Statement Before the First Decision-Making Stage in the Agency Process.

In addition to its criticism of the Commission for failing to "start over again," the lower court relied on the ICC's failure to issue an impact statement prior to a "hearing" as a subsidiary "procedural" ground for invalidating the impact statement. 371 F. Supp. at 1300 (Gov. J.S. 25a). And it directed the ICC on remand to publish its impact statement prior to a "hearing" as well as prior to its ultimate decision. *Id.* at 1306-07 (Gov. J.S. 41a-42a). The District Court thus determined that an impact statement must be prepared not only prior to the agency's *decision* in a general revenue proceeding but also prior to its reception of evidence in the course of such a proceeding.

The lower court's decision misconceives both the nature of a general revenue proceeding and the requirements of NEPA. General revenue proceedings are largely conducted through written testimony and all evidence is furnished directly to the full Commission itself. No tentative or recommended decision is made by an examiner or board at any intermediate stage: the ICC makes its own decision based upon the compiled evidence, briefs and oral argument.

Under the express language of NEPA the only environmental impact statement required is one that is to be "include[d]" in or with the agency's recommendation or report. Section 102(2)(C). Since the same section provides that the impact statement shall "accompany" the proposal through the "agency review processes," it has been argued that the impact statement must be prepared at the first decision-making stage where two or more decisions are involved, so that it may inform that initial decision and be con-

the ICC's basic task of assuring a sound and efficient rail transportation system in the United States.[67]

C. Further Proceedings, Requiring the Commission To Review for the Third Time the Environmental Effects of Ex Parte No. 281 Increases on Recyclables, Would Be a Pointless Act.

The railroads, for the reasons stated above, believe that the Commission's procedures in this case fully accord with the requirements of NEPA. Even assuming, however, that there was some technical infirmity in the course of the proceedings, the impact statement should be sustained. All parties have had ample opportunity to introduce evidence, the Commission has considered the environmental impact of the rate increases here involved in *two* extensive reports, and there is no reasonable likelihood that further proceedings would produce a different result.

Both the environmentalists and the industry groups interested in recyclables had a full opportunity at the outset of this proceeding to introduce all relevant evidence to show that the rate increases would adversely affect the environment. In fact, a large number of protests, verified statements, rebuttal or reply statements, and similar documents were introduced covering environmental as well as other issues.[68] Comments, protests, or verified statements were introduced, among others, by SCRAP, NASMI, and EDF. When the

[67] The observation made in Mr. Justice White's separate opinion in *SCRAP* bears repeating in this context. The "failure to maintain this country's railroads even in their present anemic condition will guarantee that recyclable materials will stay where they are—far beyond the reach of recycling plants that as a consequence may not be built at all." 412 U.S. at 724.

[68] The railroads alone introduced over 50 verified evidentiary statements and over 100 reply verified statements, including a number directed to recyclables or environmental issues which are contained in the Appendix (A. 421-565).

Commission re-opened the proceeding in November 1973, it invited the parties to supplement its own bibliography of environmental information, and after publishing the draft environmental impact statement, invited further comments from all interested parties.

Similarly, the Commission itself has explored the evidence in depth twice—first in its October 4 report and second in preparing its draft and final environmental impact statements. The main environmental arguments, involving claims that the rate increases would discourage the movement of recyclables, are ones which the Commission has heard many times in the past and fall within its field of expertise.[69] It is fanciful to suppose that yet a third study of precisely the same environmental claims directed at precisely the same rate increases would produce a different result in the Commission's environmental assessment, let alone a determination that different rate levels should be adopted.[70]

It is well established that even if an agency has committed a substantive or procedural error, the error

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[69] See, *e.g.*, *Ex Parte No. 256*, 332 I.C.C. 280, 329 (1968); *Ex Parte Nos. 265/267*, 339 I.C.C. 125, 206-07 (1971); *Institute of Scrap Iron & Steel* v. *Akron, C. & Y. R.R.*, 316 I.C.C. 55 (1962).

[70] Even a determination that the increases would have an adverse impact on the environment by discouraging the movement of recyclables would not, of course, require the Commission to decide that the increases should be limited or disallowed. Against any such impact would have to be weighed the needs of the railroads for adequate revenues, the adverse environmental effects of denying the railroads revenues for their own environmental programs, the impact of deteriorating railroad service on the movement of recyclables, and similar factors. The Commission's impact statement has already made clear that even if it had found some adverse effect on the environment, it would have sustained the increases here involved in light of countervailing considerations. 346 I.C.C. at 217 (A. 139).

should be deemed harmless and the agency's decision sustained unless there is some reasonable likelihood that the error has affected the outcome and that further proceedings might reasonably be expected to produce a different result. As this Court recently stated in language fully applicable here:

> "To remand would be an idle and useless formality. *Chenery* does not require that we convert judicial review of agency action into a ping-pong game. . . . There is not the slightest uncertainty as to the outcome of a proceeding before the Board, whether the Board acted through a rule or an order. It would be meaningless to remand."[71]

Judge Flannery put the matter correctly in this case when he stated that "based on the substantial record already compiled, to remand for further hearings under N.E.P.A. would require the Commission to conduct a largely ritualistic act." 371 F. Supp. at 1312 (Gov. J.S. 54a-55a).

If the proponents of an exemption of recyclables from rate increases do have evidence or arguments to advance, they will have ample opportunity to do so in *Ex Parte No. 270,* in complaint proceedings addressed to particular recyclable rates, or in subsequent general revenue cases. It would serve no purpose to further prolong the present administrative proceeding which—beginning as an emergency proceeding in response to the railroads' financial plight—is now approaching its third anniversary. As Mr. Chief Justice Burger stated in this litigation several years ago, it is important to be alert to the needs of our environment but "the world must go on and new environ-

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[71] *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969). See also *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 67 (1961); *Massachusetts Trustees* v. *United States*, 377 U.S. 235, 248 (1964); 28 U.S.C. § 2111.

mental legislation must be carefully meshed with more traditional patterns of federal regulation." 409 U.S. at 1218.

CONCLUSION

For the reasons stated, the District Court's decision should be reversed.

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sidered at subsequent stages of agency review. Here, however, the sole decision is that made by the full Commission and there is no basis whatever for requiring an impact statement at any earlier point.[63]

The lower court relied on two decisions which allegedly support the proposition that an impact statement must be prepared prior to any hearing that may be held in the course of an agency proceeding—the Second Circuit's decision in *Greene County* and Judge Wright's own decision in *Calvert Cliffs*.[64] The lower court overstates the holding of these cases in a highly significant way. Both of the decisions dealt with agency hearings which produced an examiner or hearing board report as an initial stage in the decision-making process (see 449 F.2d at 1118; 455 F.2d at 422); there was thus some arguable basis for their reliance upon the requirement in Section 102(2)(C) that the impact statement must "accompany the proposal through the existing agency review processes."[65] In a general revenue proceeding, however, hearings are not the forum

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[63] The agency must, of course, consult with and obtain comments from other federal agencies before making the impact statement. *Id.* One means of doing so, used by the ICC here, is to prepare a draft impact statement. But, again, there is no NEPA requirement that this be done at a specific point in time so long as it occurs before the final impact statement is issued.

[64] *Greene County Planning Board* v. *FPC*, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972); *Calvert Cliffs' Coordinating Committee* v. *AEC*, 449 F.2d 1109 (D.C. Cir. 1971).

[65] See 449 F.2d at 1117; 455 F.2d at 421. For example, *Calvert Cliffs* stressed that the impact statement requirement focused upon "each agency decision maker" and that Congress intended the impact statement to be "considered" by the hearing board. 449 F.2d at 1114, 1118. *Greene County* summed up its decision by saying that an impact statement must be prepared before the examiner issued "his initial decision." 455 F.2d at 422.

for an "agency decision maker" (449 F.2d at 1114) nor do they culminate in "an initial decision." 445 F.2d at 422. The first and only decision is that of the Commission itself.[66]

The District Court not only engrafted a new and unsupported requirement onto the language of NEPA but it further complicated the ICC's already burdensome task. Virtually all commodities in the country are in issue in a general revenue proceeding which embraces literally thousands of individual rates. At present, even with expedited procedures and maximum use of written evidence and comments, the ICC often barely completes its single-stage proceeding within the seven-month suspension period.

The lower court, without any statutory sanction, would add an entirely new stage to the proceedings. It would require the ICC to assemble environmental information, to prepare a draft statement, to obtain comments upon it, and to prepare a revised impact statement before undertaking the quite similar fact-gathering process that it employs in reaching its decision on the merits. See 371 F. Supp. at 1306-07 (Gov. J.S. 39a-43a). No such unwieldy, pointless exercise can contribute either to the goals of NEPA or

[66] There are, of course, other important distinctions between the instant case and *Greene County* and *Calvert Cliffs*. Both of those cases involved serious procedural infirmities not present here. 455 F.2d at 421-22; 449 F.2d at 1117. In addition, each of them involved basic license-type grants; in the present case, by contrast, the ICC determinations do not resolve the justness and reasonableness of particular rates on particular movements, and any sufficiently interested party is entitled to file a complaint against such rates under Section 13 of the Act. In sum, neither the procedures employed nor the nature of the agency action resemble those at issue in the *Greene County* and *Calvert Cliffs* cases.

at 346 I.C.C. 88.[1] The Commission's order of May 2, 1973 (J.S. App. E) is not reported.

JURISDICTION

The judgment of the district court (J.S. App. B) was entered on February 19, 1974. Notices of appeal (J.S. App. C) were filed on April 19, 1974. On June 13, 1974, the Chief Justice extended the time for docketing the appeal to and including July 2, 1974. This Court noted probable jurisdiction on October 15, 1974, and consolidated the case with No. 73–1966. The jurisdiction of this Court is conferred by 28 U.S.C. 1253. See *Baltimore & Ohio R. Co.* v. *United States*, 386 U.S. 372; *Electronic Industries Association* v. *United States*, 401 U.S. 967, affirming 310 F. Supp. 1286.

QUESTIONS PRESENTED

1. Whether the court below, in prohibiting the Interstate Commerce Commission from approving a general railroad rate increase without first conducting a thorough analysis of the underlying rate structure in an environmental impact statement, improperly interfered with the Commission's discretion to determine the appropriate type of proceeding in which to address complex questions relating to rate-making.

2. Whether NEPA requires that a new hearing be conducted to consider an environmental impact state-

[1] Ten copies each of the Commission's final report and order in Ex Parte 281, and of its final environmental statement (App. 9–199) previously have been lodged with the Court. The Commission's final report in Ex Parte 281 contained detailed discussions of commodity groups not involved in this proceeding and other non-germane discussions, which were omitted from J.S. App. D. See J.S. 1.

ment, where the sole agency decision makers conducted a hearing and considered environmental issues before reaching their decision.

STATUTES AND REGULATIONS INVOLVED

Section 15(7) of the Interstate Commerce Act, 24 Stat. 384, as amended, 49 U.S.C. 15(7), Section 102 of the National Environmental Policy Act of 1969, 83 Stat. 853, 42 U.S.C. 4332, and the Commission's special environmental rules, 49 C.F.R. 1100.250, are set out in the appendix, *infra*, pp. 55–62.

STATEMENT

This is an appeal from a final judgment of a three-judge district court (J.S. App. B) directing the Interstate Commerce Commission to conduct additional proceedings in a general revenue proceeding. This is, we hope, the final chapter in a long and complex litigation that has twice been before this Court,[2] involving the application of the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.* (NEPA), to the special requirements of general revenue proceedings of the Interstate Commerce Commission conducted pursuant to Section 15(7) of the Interstate Commerce Act, 49 U.S.C. 15(7).

A. BACKGROUND

Under the Interstate Commerce Act rates are set by the railroads, subject to disapproval by the Commission. A carrier may file a proposed rate increase and after 30 days (or such shorter period as the Commission may authorize) the new rate becomes effective

[2] *United States* v. *S.C.R.A.P.*, 412 U.S. 669; *United States* v. *S.C.R.A.P.*, 414 U.S. 1035.

as a carrier-made rate, 49 U.S.C. 6(3). However, the Commission may suspend the proposed tariff within that 30-day period for a maximum of seven months, while it conducts an investigation into the lawfulness of the rate, 49 U.S.C. 15(7). At the end of the suspension period the carrier may put the new tariff into effect unless the Commission, prior to that time, has completed its investigation and ruled that the proposed rate is unlawful. See *Arrow Transportation Co.* v. *Southern Ry. Co.*, 372 U.S. 658.

These procedures govern both the carriers' collective requests for general revenue increases, and individual rate filings. In general revenue proceedings, such as Ex Parte 281, involved here, the carriers as a group seek to increase the average rates charged. The average increase is an aggregate of the increases for particular commodities or specific groups of commodities; however, no specific authority is sought for any one of the particular increases. If the carriers demonstrate that the general revenue increase is needed to enable them to provide the Nation with adequate transportation and the Commission determines that it is consistent with the public interest, the Commission will authorize a permissive general revenue increase.[3] In such proceedings the Commission does not determine the reasonableness of individual

[3] See, *e.g.*, *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487 (E.D. Va.); *Alabama Power Co.* v. *United States*, 316 F. Supp. 337 D. D.C.), affirmed by an equally divided court *sub nom. Atlantic City Electric Co.* v. *United States*, 400 U.S. 73. Cf. *Atchison, Topeka & Santa Fe Ry. Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 814, n. 10.

rates, nor does it consider the relationship of rates for different classes of commodities. Its authorization of the general revenue incease simply gives carrier management more discretion within which to set their individual competitive rates.[4]

Faced with increasing costs during a time of inflation, and with deteriorating capital and cash flow positions (J.S. App. D, pp. 4d–20d), in December 1971, the Nation's railroads collectively petitioned the Commission for authorization to file a temporary 2.5 percent surcharge on nearly all freight rates. This emergency interim measure was intended to redress the railroads' financial condition pending their filing of proposed permanent selective revenue increases.

Because it believed that the railroads had a critical need for additional revenues the Commission permitted the surcharge to take effect on February 5, 1972, on condition that it expire before June 5. The railroads then filed proposed selective permanent increases averaging 4.1 percent. On April 24, 1972, the Commission began an investigation into the lawfulness of the permanent rate increases and suspended the increases for seven months, the maximum period allowed by Section 15(7). Because the suspended permanent increases were intended to supplant the emer-

[4] If a railroad does decide to amend its tariff, the Commission's general revenue order means that a shipper challenging any individual rate increase that is within the percentage increase authorized in the general revenue proceeding must establish that the new rate is unreasonable or otherwise unlawful. The general revenue order does no more than shift the burden of proof from the carrier to the shipper.

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gency temporary surcharge, the Commission authorized the railroads to continue to collect the 2.5 percent surcharge until November 30, 1972—the end of the suspension period on the selective increases.

B. COMMISSION PROCEEDINGS AND ENVIRONMENTAL CONSIDERATIONS

When the Commission, on December 21, 1971, advised the railroads that it would not suspend an interim surcharge, it also requested them to provide the Commission with information—in the form of an environmental impact statement—concerning the environmental effects of any proposed change in the rate structure. The railroads complied with the Commission's directive, and their statement was filed on January 3, 1972.[5]

This procedure was in compliance with the environmental rules then under consideration by the Commission as a means of implementing the Commission's responsibility, under Section 102(2)(B) of NEPA, to "identify and develop methods and procedures" for incorporating environmental considerations into all Commission decisions. Formal regulations under Section 102(2)(B) were published on January 14, 1972, and became effective March 28, 1972. See 340 I.C.C. 431; 49 C.F.R. 1100.250 (App. *infra* pp. 58–62). These regulations provide that the Commission itself will make a detailed environmental impact statement whenever "the regulatory action taken by the Commission * * * will have * * * a significant environmental

[5] The Commission summarized this statement at J. S. App. D, pp. 93d–94d.

impact." 49 C.F.R. 1100.250(b)(2). The regulations further require that with "all initial papers filed with this Commission by a party, there shall be" submitted an environmental impact statement, meeting the criteria of Section 102(2)(C) of NEPA, if it appears that the party's proposal will have a significant effect on the environment. 49 C.F.R. 1100.250(d). All environmental statements, whether drafted by the Commission or by a party, are to be served on other interested parties and governmental agencies, and their comments are invited. These rules thus seek to ensure that, in every proceeding before the Commission, all parties will focus from the outset on the possibility of environmental considerations, and that they will be in issue throughout the establised agency process.

In order to introduce additional environmental considerations into the railroads' request in this case for the permanent selective increases, the Commission's staff prepared a draft environmental impact statement, dated March 1, 1972, and served March 6, 1972. The statement concluded that no substantial environmental effects would be produced if the proposed permanent selective increases went into effect (J.S. App. D, pp. 89d–92d). Comments were invited on this draft impact statement, and were received from numerous protestants, interested persons, and government agencies (see J.S. App. D, pp. 98d–107d).

On June 15 and 16, 1972, oral argument was held before the Commission on the permanent selective increases. All interested persons were invited to address the issues, including the environmental issues, involved in Ex Parte 281. The Commission's decision,

dated September 27, 1972, and served October 4, 1972 (J.S. App. D), deals in some detail with the environmental implications of the rate increase (J.S. App. D, pp. 20d–35d, 49d–85d). The Commission considered both its draft environmental impact statement of March 6 and the comments made in response; after this "extensive consideration," *United States* v. *S.C.R.A.P.*, 412 U.S. 669, 683, n. 11, it concluded once more that no serious environmental effects would result from a marginal increase in most rail rates, in which the ratio of rates for recyclables to rates for virgin materials would be unchanged. Even so, out of an abundance of caution, the Commission ordered that rate increases on nonferrous scrap not exceed three percent (J.S. App. D, p. 60d). Moreover, the Commission withheld approval of all increases on recyclables by requiring the railroads to file their tariffs on recyclables on at least 35 days' notice (J.S. App. D, p. 87d). Two Commissioners dissented and would have disapproved the increases on recyclables (J.S. App. D, pp. 87d–88d).

During those 35 days the Commission continued to study the environmental problems, and received additional comments concerning its decision of October 4. As a result of these comments, when the railroads filed their proposed tariffs embodying the specific increases on recyclables the Commission, on November 7, 1972, suspended the tariffs, as applied to recyclables, for the maximum seven-month period allowed by statute and invited additional comments. This effectively reopened Ex Parte 281.

The Commission's staff then compiled an extensive bibliography of books, articles, and other materials that could bear on the results of a rate increase. This bibliography was distributed during December 1972 (see App. 161–182). The Commission itself published a second environmental impact statement dated March 5, 1973, and released March 13, 1973. This statement was more comprehensive than the first statement, but again concluded that permitting the selective increases to become effective would have no significant adverse impact on the environment. After receiving additional comments on this impact statement (see App. 191–198), the Commission concluded that the rate increases should be allowed to become effective.

The Commission's decision, dated May 1, 1973, and released May 2, 1973, extensively considered and responded to the comments submitted in response to the impact statement. The final decision contained a discussion of general environmental considerations (App. 17–58, 157–158), an examination of the nature of the rail rate structure and of the contentions that the rate structure is more favorable to virgin than to recyclable materials (App. 24–55), and a thorough discussion of the potential for diversion of freight from rail to truck transportation (App. 58–65). It considered the environmental questions on a commodity-by-commodity basis (App. 70–137). Because ferrous scrap is the major recycled waste product, the statement also considered the effects of the rate structure on steel-making technology and the steel industry, and of steel-making technology on the demand for ferrous scrap (App. 76–82). The Commission attempted

to draw inferences about the elasticity of demand for scrap and the consequent effect of a change in rail rates; its data showed no significant correlation between the trend of rail prices and the fluctuations in the employment or price of secondary commodities (App. 67). Finally, the Commission discussed alternatives to rate increases on recyclable commodities, and concluded that scrap users and shippers—rather than transportation companies through nonremunerative rates—should bear the cost of shipping scrap (App. 140–157).

After weighing all of these considerations and alternatives, including those discussed in its second environmental impact statement, the comments thereto and "all available literature" compiled in the bibliography (App. 14), the Commission once more concluded that an across-the-board increase in the rates for transportation of both recyclable and virgin materials would not have a significant adverse effect on the environment and that, to the extent there was any effect, it was justified by the railroads' pressing need for funds and the principle that shippers should pay just and reasonable rates for each class of commodities shipped (App. 158). The Commission therefore terminated the proceeding, allowing the rates to go into effect on June 7, 1973, approximately one and one-half years after the railroads first had requested the increase.

C. PREVIOUS JUDICIAL PROCEEDINGS

At numerous points in the Commission's proceedings environmental groups, and other interested parties, have sought judicial review of the Commission's

actions. Immediately after the Commission first suspended the permanent selective increases and extended the duration of the interim surcharge, a group of law students—Students Challenging Regulatory Agency Procedures (S.C.R.A.P.)—filed suit alleging that the Commission's environmental considerations in deciding not to suspend the surcharge were inadequate. Other interested environmentalists intervened in this suit. The three-judge district court enjoined the railroads from collecting the surcharge, and ordered the Commission to vacate its order permitting the surcharge to become effective without suspension. 346 F. Supp. 189 (D. D.C.). This Court reversed, holding that under Section 15(7) of the Interstate Commerce Act the Commission has exclusive power to suspend rates pending its decision on their lawfulness, and that NEPA had not conferred on the district court any authority over such suspension decisions. *United States* v. *S.C.R.A.P.*, 412 U.S. 669.

While that case was pending in this Court, S.C.R.A.P. and the other groups sought to enjoin the permanent increases that the Commission had authorized on October 4, 1972. On January 9, 1973, the district court denied the requested injunction in light of the Commission's November 7 order suspending the tariffs on recyclables and reopening Ex Parte 281. 353 F. Supp. 317 (D. D.C.). After the Commission on May 2, 1973, again approved the increases, the plaintiffs on May 30 renewed their request for an injunction. On June 7, 1973, in an unpublished order, the district court preliminarily enjoined the Commission from permitting, and the railroads from collecting, the increases.

The next day the Commission and the railroads filed applications in this Court seeking a stay of the district court's order. Mr. Chief Justice Burger that day granted the stay; on June 25, 1973, this Court denied an application to vacate the stay. 413 U.S. 917. The district court's injunction subsequently was vacated, 414 U.S. 1035, and the case was remanded for further consideration in light of *Atchison, Topeka & Santa Fe Ry. Co.* v. *Wichita Board of Trade,* 412 U.S. 800.

D. THE PROCEEDINGS NOW ON APPEAL

While the government's appeal from the June 7 injunction was pending in this Court, the appellees filed motions for summary judgment in the district court. They sought (1) a declaration that the Commission's approval of the selective rate increases was void because the environmental impact statement was inadequate; (2) an order directing the Commission to prepare a new impact statement and reconsider the rate increases; and (3) a permanent injunction forbidding the railroads from collecting the increased rates on recyclables authorized by Ex Parte 281. The government and the railroads filed cross-motions for summary judgment; the railroads also filed affidavits demonstrating the severe financial effects on them of any injunction prohibiting their collection of the increased rates.

On February 19, 1974, the district court set aside the Commission's approval of the increases on recyclables, and ordered the Commission to reopen Ex Parte 281, issue another impact statement, and re-

consider in full all of the issues in the proceeding (371 F. Supp. 1291; J.S. App. A).[6]

The court held the Commission's environmenal impact statement inadequate. The most important defect, in the court's view, was that the statement confined its "analysis to the marginal impact of the most recent rate increase with no discussion of whether the underlying rate structure itself significantly affects the environment" (J.S. App. A, p. 34a). The court also believed that the impact statement inadequately analyzed the elasticities of demand of many of the scrap categories, and therefore could not have shown with certainty the effect of a particular rate increase on the use of the transported goods (J.S. App. A, pp. 31a–32a).[7]

The district court also ruled that the Commission had failed to give sufficient consideration to the impact statement it drafted because, after the impact statement of March 5, 1973, was circulated, the Commission did not hold new oral hearings but instead allowed only written commentary; the court held that the Commission had thus failed to follow the NEPA requirement that the impact statement accompany the pro-

[6] However, the district court declined to enjoin the railroads from collecting the increased rates. J.S. App. A, pp. 6a, 44a–50a. See *Atchison, Topeka & Santa Fe Ry. Co.* v. *Wichita Board of Trade*, 412 U.S. 800.

[7] The court referred also to what it regarded as subsidiary "defects" of the statement, such as the "defensive and advocatory language and style in which it is written," J.S. App. A, p. 29a; the fact that it was prepared by the Commission's staff, J.S. App. A, p. 23a (see n. 11, *infra*); and the alleged failure of the final report to "confront or even acknowledge the critical comments" of other interested parties, J.S. App. A, p. 23a. See p. 35, n. 16, *infra*.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1971

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The opinion of the district court (J.S. App. A, pp. 1a–56a) is reported at 371 F. Supp. 1291. The Interstate Commerce Commission's opinion and order dated September 27, 1972, and served October 4, 1972, in Ex Parte 281, *Increased Freight Rates and Charges, 1972* (J.S. App. D) is reported at 341 I.C.C. 290. The Commission's final environmental impact statement and consideration of environmental matters is reported

by commodity group. Comments again were invited and considered. Finally, the Commission approved most of the increases on scrap, but limited the increases on non-ferrous scrap to three percent. In doing so, the Commission determined that there would be no significant adverse effect on the environment, and that the possible environmental impact in certain categories of scrap was justified by countervailing considerations. We submit that this procedure fulfilled the duties imposed by NEPA on the Commission.

The district court, however, found the procedure inadequate. To the extent the court did so because of alleged defects in the impact statement itself, it was both overemphasizing the role of the impact statement in the process of giving consideration to environmental effects, and improperly substituting its judgment for that of the Commission concerning the magnitude of the potential environmental effects identified by the statement and the protestants.

II.

The decision below also improperly interfered with the Commission's authority to govern its proceedings. The Commission traditionally has used the general revenue proceeding only as a temporary expedient, a method of authorizing an overall rate increase without an examination of particular rates or of the basic rate structure. Particular rates always may be challenged by protestants in separate proceedings. Moreover, although thorough examinations of the entire rate structure are infrequent, one is now under way in Ex Parte 270; it was commenced four years ago and

will consume several years more before it is completed. The district court's directive to the Commission to consider in a general revenue proceeding all of the environmental effects of the entire rate structure effectively would prohibit the Commission from holding general revenue proceedings, which must be completed within seven months. This is a substantial interference with the Commission's ability to decide on the most efficient method to conduct its enquiry; it was entirely reasonable for the Commission to decide, as it has, to investigate the entire rate structure in a single, consolidated proceeding, while limiting its consideration of other rate requests largely to their marginal effects on both the rate structure and the environment.

III.

It also was proper for the Commission to conclude its environmental consideration without holding oral hearings after it had issued the March 1973 impact statement. The Commission's general revenue proceedings are rulemaking under Section 553 of the Administrative Procedure Act, 5 U.S.C. 553, and such proceedings do not require oral hearings. The Commission sometimes conducts such hearings at some point in a general revenue proceeding, but it does not entertain oral hearings in all or even most such proceedings, let alone separate oral hearings on each issue. There was, accordingly, no requirement under NEPA that the Commission reopen the entire general revenue proceeding and afford new hearings.

ARGUMENT

I. THE COMMISSION'S CONSIDERATION OF ENVIRONMENTAL FACTORS WAS ADEQUATE

A. NEPA REQUIRES THE COMMISSION TO TAKE A HARD LOOK AT ENVIRONMENTAL FACTORS

Like its predecessor *United States* v. *S.C.R.A.P.*, 412 U.S. 669, this case involves problems of accommodation between the National Environmental Policy Act of 1969 (NEPA) and the Commission's disposition of a general revenue proceeding under Section 15(7) of the Interstate Commerce Act, 49 U.S.C. 15(7).

NEPA was enacted to ensure that federal agencies would consider the environmental effects of their decisions. See, generally, Hearing before the Senate Committee on Interior and Insular Affairs, on S. 1075, S. 237 and S. 1752 (National Environmental Policy), 91st Cong., 1st Sess. 24–34. Congress chose several tools to bring about this consideration: it required each agency to utilize the natural and social sciences and the environmental arts when the agency's decision might have an impact on the environment (Section 102(2)(A)); to identify and develop methods and procedures to ensure that environmental considerations enter into all decisions (Section 102(2)(B)); and to "include in every recommendation or report on * * * major Federal actions significantly affecting the quality of the human environment" a detailed statement concerning environmental effects and alternatives (Section 102(2)(C)). This last requirement—the "environmental impact statement"—essentially requires the agency to set

down in words the environmental effects it has found, and the considerations it deems relevant, in light of the investigations required by Section 102(2)(A), (B), and (D). The statement's preparation, therefore, does not require additional investigations beyond the scope of those specified in the other parts of Section 102. The function of the impact statement is to alert the public and other federal agencies to the environmental issues potentially raised in an agency proceeding, so that they may comment; it also is useful to remind the agency itself of the environmental concerns—it is to "accompany the proposal through the existing agency review processes" (Section 102(2)(C)).

The impact statement is thus no more than the agency's report to the public and to itself concerning its environmental findings. Accordingly, the impact statement requirement does not mean the agency is required to adopt any particular form of environmental review; nor does it alter the laws that control the conduct of the Commission's proceedings or the laws that govern judicial review of the Commission's actions. *S.C.R.A.P., supra,* 412 U.S. at 692–694. As Senator Jackson, the principal sponsor of NEPA, stated on the floor of the Senate, NEPA's procedural requirements simply direct "all agencies to assure consideration of the environmental impact of their actions in decision-making" (115 Cong. Rec. 40416). See *Calvert Cliffs' Coordinating Committee* v. *Atomic Energy Commission,* 449 F. 2d 1109, 1114 (C.A.D.C.):

> The apparent purpose of the "detailed statement" is to aid in the agencies' own decision making process and to advise other interested agencies and the public of the environmental consequences of planned federal action.

Accord, *Cape Henry Bird Club* v. *Laird*, 359 F. Supp. 404 (W.D. Va.), affirmed, 484 F. 2d 453 (C.A. 4). There is no suggestion in the legislative history of NEPA that Congress intended to require a particular form of compliance with the requirement that environmental considerations be discovered and communicated to the public. It was enough that the discovery and communication take place. Nor is there any suggestion that environmental considerations are to dominate other concerns when the agency is considering them in reaching a final decision.

Accordingly, the federal courts properly have applied a rule of reason when ascertaining whether a federal agency has complied with the requirements of Section 102.[8] "So long as the officials and agencies have taken the 'hard look' at environmental consequences mandated by Congress," they have fulfilled the duty imposed on them by NEPA. *Natural Resources Defense Council, Inc.* v. *Morton*, 458 F.2d 827, 838 (C.A.D.C.).

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[8] See, *e.g.*, *Environmental Defense Fund, Inc.* v. *Corps of Engineers*, 470 F.2d 289, 294–297 (C.A. 8); *Bradford Township* v. *Illinois State Toll Highway Authority*, 463 F.2d 537 (C.A. 7), certiorari denied, 409 U.S. 1047; *Natural Resources Defense Council, Inc.* v. *Morton*, 458 F.2d 827, 838 (C.A.D.C.); *National Helium Corp.* v. *Morton*, 455 F.2d 650, 656–657 (C.A. 10); *Upper Pecos Association* v. *Stans*, 452 F.2d 1233 (C.A. 10).

Although every federal agency must take a hard look at the environmental consequences of its decisions, the nature of the inquiry that is appropriate and required depends on the nature of the function performed by the agency and the type of decision under consideration. *Scientists' Institute for Public Information, Inc.* v. *Atomic Energy Commission,* 481 F.2d 1079, 1091–1092, 1095, n. 68 (C.A.D.C.). It is thus significant that the Commission here performs a function different from that of many other federal agencies. Railroad rates are set in tariffs filed by each rail company. The role of the Commission is limited. The Commission may investigate a proposed rate, and declare that it is not just and reasonable; it may suspend rates for as long as seven months in order to complete such an investigation. But if the Commission cannot declare that the rate is unlawful, it takes effect. The process is instigated by private parties. The Commission essentially adjudicates the lawfulness of the carrier's proposed rate. To be sure, the Commission is an active adjudicator; Commission staff gathers information independent of that submitted by the parties and protestants. But its role is less active than that of other agencies that propose specific projects, decide whether the project will take place at all and, if so, where it will be built or occur and in what form.

The Commission's role is more limited still in a general revenue proceeding, as it explained in this case (App. 148–149):

> The general rate case or general revenue proceeding is altogether different [from rate adjustment or investigation proceedings]. * * *

> Our authorization of the requested increases, or some other increases, which we determine to be just and reasonable, in no way is an approval by us of the resultant rates and charges on specific articles and movements. It merely is an indication by us that we are persuaded by the railroads' revenue requirements and that they may increase their rates and charges to the level authorized by us to meet their demonstrated needs for increased revenues. * * * [O]ur authorization in general rate cases or general revenue proceedings *does not connote our sanction of any particular rate or group of rates as increased* by the railroads * * * [emphasis added].

The Commission's approval of a general revenue increase does no more than indicate that the railroads have an overall need for increased revenues.[9] It does not approve any particular tariff setting forth a specific rate for any commodity. After the general rate increase has been approved each railroad must file a tariff setting out each rate increase; these tariffs may be challenged on any appropriate ground and the Commission's action in the general revenue proceedings merely shifts to the protestant the burden of assailing a tariff established within the percentage increases authorized in the general revenue proceeding. The general revenue proceeding is useful to the Commission, the railroads, and the public precisely because it is "general"—it is addressed to an overall need for revenue and leaves other and more specific questions for another proceeding. Only by this divi-

[9] See cases cited in note 3, *supra*.

sion of functions is it possible for rates to be studied in time for the Commission's decision to be useful.

In these circumstances, we submit, NEPA does not require the Commission to conduct environmental studies or make environmental reports more exhaustive in scope than the fiscal and financial studies and reports that are at the heart of a general revenue proceeding. It is our position that the Commission fulfills its duties under NEPA if it undertakes in good faith to ascertain the potential environmental consequences of its general revenue decisions (Section 102 (2)(A)), and makes a reasonable attempt to ascertain the magnitude of those effects (Section 102(2)(B)). If the Commission determines, as a result of these preliminary and "automatic" environmental investigations that the decision confronting it would "significantly affect * * * the quality of the human environment," it must set down the nature of this effect in a "detailed statement" so that it can be discussed both within and without the agency (Section 102(2)(C)). The Commission must listen to comments concerning its preliminary analysis (Section 102(2)(C)), and, if a conflict between environmental values and other concerns of the Commission develops, the Commission must analyze alternatives that might minimize that conflict (Section 102(2)(D)). But having done all of this, the Commission is entitled to reach its own decision concerning the resolution of the conflict, subject only to the ordinary requirement that the Commission's ultimate decision not be arbitrary or capricious in light of the evidence developed. Cf. *Bowman Transportation, Inc.* v. *Arkansas-Best Freight Sys-*

tem, Inc., No. 73–1055, decided December 23, 1974, slip op. 4, 10–12; *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 749, 753. There is no requirement in Section 102 that the environmental examination be exhaustive or unceasing; nor is there any requirement that the environmenal analysis be more extensive than the analysis suitable to the other factors that the Commission must consider in the general revenue proceeding. Indeed, the impact statement specified in Section 102(2)(C) is not required at all unless the preliminary analysis required by Section 102(2)(A) and (B) reveals significant environmental consequences. The agency is not required—to change the well-known metaphor—to conduct a search for the soot speck in the haystack. Cf. *Louisiana* v. *Federal Power Commission*, 503 F.2d 844, 875–877 (C.A. 5).

B. THE COMMISSION'S ANALYSIS INCLUDED A HARD LOOK AT ENVIRONMENTAL CONSEQUENCES

1. Environmental Considerations Pervaded Ex Parte 281

Although a general revenue proceeding is by its nature rapid and not an exhaustive investigation, and although the Commission is responsible only for approval of a revenue increase rather than for the specific rates, environmental considerations, addressed to the propriety of specific rate increases on recyclables (scrap), entered Ex Parte 281 at its outset. The Commission on December 21, 1971, required the rail-

roads to file an environmental impact statement. They complied on January 3, 1972. From that point on the parties and protestants were on notice that the Commission actively was considering the environmental consequences of a general rate increase. All were entitled to comment to the Commission on the railroads' submission.[10] See 49 C.F.R. 1100.250(e)(2) and (3).

In order further to facilitate discussion the Commission's staff prepared, and the Commission released, a draft environmental impact statement, which was served on March 6, 1972. The parties were told that the Commission did not believe that there would be significant environmental effects from a general rate increase. Again the concerned parties were at liberty to file comments disagreeing with this evaluation; many did so. The Commission listened to additional comments at the oral hearing on June 15 and 16, 1972. The Commission's decision, served October 4, 1972, fully considered the environmental problems and, with all of the contrary views before it, it again concluded that there would be no significant impact. However, out of an abundance of caution, the Commission limited increases on nonferrous scrap to three percent, which would make such scrap relatively more attractive compared with virgin materials, the transportation costs of which were increased more greatly. The Commission also extended to the maximum the notice

[10] Cf. *Union of Concerned Scientists* v. *Atomic Energy Commission*, 499 F.2d 1069 (C.A.D.C.), holding that an applicant's impact statement, together with analysis and comment by the agency's staff, may fulfill an agency's NEPA obligations.

the railroads would be required to give before the rates on scrap could become effective, so that it could continue to consider the increases on recyclables.

During this interim additional comments were received. As a result the Commission suspended the tariffs on recyclables for the maximum seven-month period permitted by Section 15(7), effectively reopening Ex Parte 281. The Commission published a comprehensive bibliography of literature bearing on the environmental effects of rate increases, and accepted comments and suggestions of additional literature that should be surveyed. It then published another draft impact statement (App. 200–420), this one much more extensive than the first. This second impact statement, served on March 13, 1973, discussed all of the points and considerations that had been raised since the proceedings began more than a year earlier; it included discussions of "discrimination" against recyclables as a class, the potential for diversion of rail traffic to "more polluting" transportation means such as trucks, and a commodity-by-commodity study of the impact of the rate increases. Environmental comments were again invited—for the sixth time in Ex Parte 281. It was only after this sixth round of environmental publication followed by comment that the Commission finally concluded that an across-the-board rate increase would not significantly affect the environment, and terminated Ex Parte 281.

We submit that it is apparent from this chronology that the Commission was sensitive to the potential effect of rate increases on the environment, and that it took the hard look required by NEPA.

2. *The Commission's Environmental Impact Statement Was Adequate*

The district court, instead of considering the entire record of the Commission's consideration of environmental factors in Ex Parte 281, focused its critique solely on the draft environmental impact statement of March 13, 1973, as adopted in the May 2, 1973 Commission report. We submit that this was improper. NEPA was intended to produce adequate environmental consideration; the impact statement required by Section 102(2)(C) is not an end in itself but simply one means among many to produce such adequate consideration. Accordingly, where the record discloses adequate consideration of environmental factors, technical defects in an impact statement do not prevent the agency from making a valid final decision. See, *e.g.*, *Life of the Land* v. *Brinegar,* 485 F. 2d 460 (C.A. 9), certiorari denied, 416 U.S. 961; *Upper Pecos Association* v. *Stans, supra,* 452 F. 2d at 1237; *City of New York* v. *United States,* 344 F. Supp. 929 (E.D. N.Y.) (Friendly, J.).

In any event, the district court's criticisms of the Commission's impact statement are not persuasive.[11] As this Court has noted, the gravamen of the environmentalists' allegations of adverse environmental ef-

[11] There is no substance to the district court's denigration of the Commission's final impact statement as a "staff-prepared impact statement" (J.S. App. A, p. 23a). Although the Commissioners of course employed staff assistance to perform the physical task of research and writing (cf. *T.S.C. Motor Freight Lines, Inc.* v. *United States*, 186 F. Supp. 777 (S.D. Tex), affirmed *sub nom. Herrin Transportation Co.* v. *United States*, 366 U.S. 419), the final statement was adopted by the full Commission as its own and is an official Commission document.

posed rate increase through all existing agency review procedures (J.S. App. A, pp. 42a–43a).

District Judge Flannery dissented (J.S. App. A, pp. 51a–56a) on the ground that the district court did not have jurisdiction to entertain a challenge to a general revenue proceeding of the Commission; Judge Flannery would have required S.C.R.A.P. and others to begin proceedings in the Commission alleging that a particular rate was not just and reasonable. On the environmental issues, he concluded that the Commission's procedures had complied with NEPA because the Commission "has clearly taken the 'hard look' at possible environmental consequences mandated by Congress" (J.S. App. A, p. 55a).

SUMMARY OF ARGUMENT

The basic purpose of NEPA is to ensure that federal decision makers give full consideration to the environmental effects of their decision; NEPA adds a new factor to the other factors particular agencies ordinarily must weigh. But neither NEPA as a whole, nor the requirement in Section 102(2)(C) that the agency prepare an impact statement, elevates environmental factors to a dominant position. It is sufficient for the agency to take a hard look at the potential environmental effects (in accordance with NEPA's procedural requirements) and to exercise its statutory responsibilities in light of that hard look.

The practical meaning of the required "hard look" necessarily depends on the particular function the agency is performing and the type of decision under consideration. The peculiar limitations of the Com-

mission's role in a general revenue proceeding are thus significant. In such a proceeding the Commission does not propose action but merely passes on the legality of action that emanates from the railroads. Such a proceeding operates under severe statutory time constraints, and the Commission accordingly bases its deliberations essentially on marginal concerns; it takes as given the previous rate structure and assesses the legality of the proposed changes. And the Commission's decision, of course, must be based on accepted ratemaking criteria. In light of these considerations, we submit that the requirements of NEPA were satisfied here.

I.

The Commission here gave "extensive consideration to environmental aspects of the rate increases," *S.C.R.A.P., supra,* 412 U.S. at 683, n. 11. Environmental considerations pervaded the general revenue proceeding. The railroads were required to submit their own impact statement. Comments were invited on those materials. The Commission published an impact statement and invited comments in March 1972. All interested persons who wished to do so submitted written comments and appeared at oral hearings held in June 1972, and the Commission's decision in October 1972 discussed environmental concerns that had been suggested. The Commission then published its bibliography and solicited comments. It issued a massive impact statement analyzing in detail not only the general environmental arguments that had been advanced since early 1972, but also the potential impact

Similarly, other secondary materials are affected minimally by increases in rail rates. In the paper industry, for example, processing plants traditionally are located near sources of pulpwood rather than near sources of recyclable paper; this imposes greater transportation costs on the latter because of greater distances (App. 87). Moreover, virgin products have been available at low cost, thus making it very hard for the recyclable commodities to compete (*ibid.*). All this properly led to the conclusion that the maximum 3% increase on wastepaper would not have a significant adverse effect on the environment (App. 97).

The Commission also analyzed the assertion that scrap contributes a disproportionate share of rail revenues over costs, and concluded that this contention is inaccurate. As the Commission explained in *Institute of Scrap Iron and Steel, Inc.* v. *Akron, C. & Y. R.*, 316 I.C.C. 55, 62–63, sustained *sub nom. Frank Adams & Co.* v. *United States* (unreported, Civ. No. 5093, S.D. Ohio, May 8, 1963), affirmed *per curiam*, 375 U.S. 215:

> The movement of iron ore is highly concentrated. Ninety percent of the total traffic moves from seven Lake ports and three north Atlantic ports, and is delivered to the railroads by vessels in quantities averaging over 12,000 gross tons at the Lake ports and 23,000 gross tons at the Atlantic ports. The remainder of the iron ore traffic originates at eight domestic mine origins and moves in quantities amounting either to trainloads or substantial fractions of trainloads. The entire traffic, amounting to over 60 million net tons in 1957, is delivered at ap-

proximately 90 destinations where blast furnaces are located. By contrast, scrap iron moves from many points, 501 origins in a typical month. A study made by the Bethlehem Steel Company showed 263 origins, with individual plants receiving scrap from as many as 115 origins. Although the origin and destination points for iron ore are constant from year to year there are frequent changes in the origins from which particular mills obtain their scrap.

The average weight per carload differs widely, iron ore loading in excess of 70 net tons and scrap to 50 net tons. While iron ore moves largely over single-line direct routes, scrap moves over a multiplicity of routes, some of which are extremely circuitous. Because iron ore is frequently delivered to the railroads in quantities in excess of trainloads, it does not require the very expensive terminal services involved in way train and classification-yard services which are characteristic of the movement of any commodity such as scrap, where the typical movement is a single carload. * * *

In these circumstances the Commission concluded that the mere fact that the revenue yield from one carload of scrap may be slightly higher than the revenue yield from one carload of ore does not establish rate discrimination. Moreover, the Commission concluded that comparison only on a per-car basis is misleading because scrap and iron ore are not interchangeable on a one-for-one basis in the steelmaking process. After analyzing the industrial process involved the Commission computed the transportation cost for one ton of scrap and the equivalent amount of

virgin raw materials, with the following results (App. 81):

Transportation cost[1] *of scrap*[2] *and comparable raw materials*[3]

	1966	1969	Present	With Ex Parte 281
Raw materials:				
With coking coal	$5.72	$6.67	$8.49	$8.87
With coke	5.80	7.15	8.62	9.03
Scrap	4.12	4.50	5.58	5.83
Difference:				
With coking coal	1.60	2.17	2.91	3.04
With coke	1.68	2.65	3.04	3.20

[1] Average revenue per ton.
[2] One ton of scrap iron or steel.
[3] Raw materials required to produce one ton of pig iron.

In other words, when compared with the virgin raw materials with which it actually competes in the steel-making process, ferrous scrap already enjoys a rate advantage of more than $3.00 per ton, and that advantage is increased as a result of the Ex Parte 281 general increase.[13]

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[13] Moreover, despite recent legislative attempts to tie the rail freight rate structure to costs (see, *e.g.*, S. 2842, 92d Cong., 1st Sess., which would have amended the Interstate Commerce Act to tie railroad rates to variable and fully allocated costs), railroad rates have never been based solely on costs, but rather are set by carrier management on the basis of a variety of factors. As this Court stated in *Northern Pacific Ry.* v. *North Dakota*, 236 U.S. 585, 598–599, a railroad "is not bound to fix uniform rates for all commodities or to secure the same percentage of profit on every sort of business. There are many factors to be considered—differences in the articles transported, the care required, the risk assumed, the value of the service, and it is obviously important that there should be reasonable adjustments and classifications." With respect to ferrous scrap *vis-a-vis* iron ore, other important transportation characteristics include the predictability, regularity and routinization of shipments, and the physical characteristics of handling the commodities.

We submit that, in its extensive consideration of the environmental consequences of the proposed general increase,[14] the Commission has complied with the requirements of NEPA. The agency has taken the requisite "hard look" at environmental factors in reaching its decision, and its conclusion that the proposed general increase will have no significant adverse effect on the environment was well within its discretion.

Moreover, even if it were assumed that the rate increase has environmental effects, there are two sides to the environmental picture—a matter carefully explored by the Commission but wholly ignored by the court below. The importance of additional revenue to the economic well-being of the railroads is evident. In addition, the Commission concluded, increased rail-

[14] In addition to the matters discussed above, the Commission's final impact statement also discussed in detail the remaining four NEPA criteria. It concluded, *inter alia*, that the general increase applicable to recyclables would not cause any unavoidable adverse environmental effect (App. 138–139), that, by guaranteeing the continuation of rail service, it will have a beneficial long-term effect (App. 157), and that it would not result in any irreversible and irretrievable commitments of resources (App. 157–158). The possible alternatives to the increase were considered in some detail, including the possibility of a hold-down of rates on recyclables until the completion of Ex Parte 270 (App. 145–146), the use of selective increases on a commodity-by-commodity basis in lieu of general increases (App. 146–150), the imposition of a requirement that railroads reduce their costs (App. 150–151), the possibility of federal or state subsidies to railroads (App. 151) or "deregulation" of recyclables (App. 154–155), and expansion of government purchases of recyclables (App. 155–156), but concluded that there was "no warrant for deferring our actions in favor of any of them" (App. 157).

road revenues will produce collateral environmental benefits. For example, the railroads now face significant direct environmental costs which can be met only by sufficient revenue. The railroads spent $10 million per year in 1969 and 1970 on pollution control and devoted $55 million to capital improvements for environmental purposes between 1968 and 1970 (App. 58). Such expenditures can be made only if the railroads have sufficient revenues to meet the costs. Similarly, the threat of traffic diversion to trucks, or of non-movement of scrap, is in large part a factor of the railroads' inability to provide adequate service—a direct result of their inability to pay for capital improvements in roadbed, equipment, and the like. The history of this problem considerably antedates NEPA, and has been noted in a number of prior Commission decisions (see App. 58–65). To a large extent, it is a problem of adequate supply and utilization of freight cars (see *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742; *United States* v. *Florida East Coast Ry. Co.*, 410 U.S. 224), and it is the constant subject of legislative attempts to provide assistance to the railroads.[15] And, as Mr. Justice White graphically noted in concurring in a portion of this Court's prior opinion in this case (412 U.S. at 724), "failure to maintain this country's railroads even in their present anemic condition will guarantee that re-

[15] A recent example is S. 1149, 93d Cong., 1st Sess., a bill to provide government loan guarantees for the railroads' purchases of new freight cars, which was reported out of the Senate Committee on Commerce (S. Rep. No. 93–303, 93d Cong., 1st Sess.) and passed by the Senate.

cyclable materials will stay where they are—far beyond the reach of recycling plants that as a consequence may not be built at all."

Against this background the district court's criticisms do not show noncompliance with NEPA. There was no need for the Commission to "offer any rigorous price sensitivity studies of its own" (J.S. App. A, p. 31a) when the data it introduced indicated that the scrap market was not sensitive to rail rate increases of the magnitude involved here; there is no need for the Commission to duplicate the work of others, nor is it necessary to conduct additional studies merely because preliminary studies show no environmental effect. NEPA does not require the maximum possible effort to ferret out possible effects; it requires only a reasonable effort.

Nor is the statement defective because the district court found "defensive and advocatory language" (J.S. App. A, p. 29a). The "defensive" language to which the court objected was part of the Commission's response to comments that had criticized its analysis. This process of comment and response is integral to a demonstration that environmental effects were considered in the decision; surely, if it believes one of the protestants is wrong, the Commission is entitled to say so, and to say why.[16]

[16] Although the district court complained about the "attacks" in the impact statement on the views of those opposing the increase (J.S. App. A, p. 29a), it also complained that the Commission's final opinion does not "confront or even acknowledge the critical comments of other concerned agencies and environmental groups appended to the statement" (*id.* at 23a–24a). But see J.S. App. A, p. 31a. ("The Commission appended these comments to the back of its final statement and in some

3. *The District Court May Not Reject an Impact Statement Merely Because It Disagrees With the Statement's Conclusions*

Although the district court eschewed any "substantive" review of the Commission's conclusions (J.S. App. A, p. 22a), many of its criticisms of the impact statement are, at bottom, substantive. For example, the Court complained of the Commission's failure "to alter its draft impact statement in response to three of the critical comments * * *" (J.S. App. A, p. 31a). But the Commission would be required to "alter" its impact statement to meet criticism only if the critics were right and the Commission wrong. And the Commission would be required to conduct additional "price sensitivity studies of its own" (*ibid.*) only if it were wrong in concluding that the data before it indicates that the effect of rail prices is minimal. Indeed, the language of the impact statement may be viewed as "defensive" only if the court agrees with the critics rather than with the Commission's response that certain critics are "one-dimensional" or "naive" (App. 16).

In these respects, therefore, the district court's approach was basically substantive rather than procedural. And it is difficult to believe that the court would have ordered the Commission to reconsider if the Commission had concluded, on the basis of the same

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instances made arguments against the criticisms within the body of this final statement.") There is, we submit, no legal basis for requiring the Commission's answers to environmental criticisms to be omitted from its impact statement and, instead, to be separately stated in an opinion.

impact statement, that environmental considerations required the rate increases on scrap to be disapproved, and the railroads had sought review. Indeed, the court suggested (J.S. App. A, pp. 37a–38a), presumably on the basis of the same statement and record on which the Commission here acted, that the Commission should have prohibited the scrap rate increases altogether until it completed its investigation (now proceeding in Ex Parte 270) of the entire railroad rate structure. But under Section 15(7) the Commission could not order such a moratorium unless it were convinced that the proposed rates were *not* just and reasonable. It is therefore apparent that the district court, rather than finding a lack of evidence to support the Commission's position, has weighed the evidence *de novo* and concluded that environmental factors justified indefinite postponement of the rate increases.

This scope of substantive review is improper under the decisions of this Court. The Commission's evaluation of the evidence, and its choice of methodology for gathering sufficient evidence, should not be set aside where, as here, it is "rationally supported." *Allegheny-Ludlum Steel Corp., supra,* 406 U.S. at 749. NEPA does not create a different scope of judicial review of Commission determinations; NEPA merely requires the Commission to make additional determinations which are subject to review under the ordinary standards. A thoughtful analysis of the relation of NEPA to the scope of review of Commission decisions was penned by Judge Friendly for the court in *City*

of New York v. *United States, supra,* 344 F. Supp. at 939–940:

> Normally, of course, judicial review of the merits of an ICC abandonment order is governed by the standards expressed in § 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706 [citations omitted], and thus is generally limited to determining, in essence, whether the Commission's findings and conclusions are supported by substantial evidence and are not an abuse of discretion. We seriously doubt, however, that the merits of the Commission's determinations under NEPA are subject to even that degree of review. NEPA itself contains no requirement that an agency hold hearings to investigate the environmental consequences of the proposed action, and does not specify that findings are necessarily to be made. Moreover, NEPA is often applicable to agency decision making where adjudicatory proceedings are not required. [Citations omitted.] No formal record is contemplated in such situations and the function of the courts is thus necessarily limited. [Citation omitted.] To ensure implementation of the national environmental policy, see NEPA § 101, 42 U.S.C. § 4331, procedures were prescribed in § 102(2) to compel administrative exploration and consideration of environmental consequences. *Once it is determined in any particular instance that there has been good faith compliance with those procedures, we seriously question whether much remains for a reviewing court.* In this vein, it has been suggested that "reviewing courts probably cannot reverse a substantive decision on its mer-

> its, under [NEPA], unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental factors." *Calvert Cliffs', supra,* 449 F. 2d 1115 [footnotes omitted; emphasis added].

We submit that this is the correct approach, and that the district court here has exceeded the scope of review open to it.[17] See, *e.g., Louisiana* v. *Federal Power Commission, supra; Jicarilla Apache Tribe of Indians* v. *Morton,* 471 F.2d 1275 (C.A. 9); *Committee for Nuclear Responsibility, Inc.* v. *Seaborg,* 463 F.2d 783 (C.A.D.C.); *Upper Pecos Association* v. *Stans, supra.*

II. THE DISTRICT COURT IMPROPERLY INTERFERED WITH THE COMMISSION'S DISCRETION TO DETERMINE THE APPROPRIATE PROCEEDING IN WHICH TO CONSIDER THE BASIC RATE STRUCTURE

In addition to the district court's criticisms of the impact statement discussed *supra,* the court also leveled two procedural criticisms. The court held, first, that the Commission was required, in a general revenue proceeding, to analyze the environmental effects of the entire railroad rate structure, and, second, that the Commission was required to recommence the entire review procedure after drafting an impact statement adequate in the eyes of the court. We address

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[17] Indeed, some courts have confined review of impact statements to whether the agency made "an objective good faith effort to comply with the statutory procedural requirements." *National Helium Corp.* v. *Morton,* 486 F.2d 995, 1001 (C.A. 10), certiorari denied, 416 U.S. 993. See also, *Hiram Clarke Civic Club, Inc.* v. *Lynn,* 476 F.2d 421, 425 (C.A. 5).

the first of these holdings here and the second in point III, *infra*.

A. NEPA DOES NOT TAKE AWAY THE COMMISSION'S DISCRETION TO DETERMINE THE APPROPRIATE PROCEEDINGS IN WHICH TO CONSIDER PARTICULAR ISSUES

The Commission's final impact statement showed that the Commission here "made an examination of the presently effective railroad rate structure" (App. 26) and determined that "[t]he present rate structure * * * does not, in our opinion, unduly hamper the free flow of [recyclable] materials * * * " (App. 152). In support of this conclusion the Commission examined waybill samples, costs and technologies in the scrap and competing virgin-source industries, manufacturing techniques, pricing factors, volume of movements, transportation costs and characteristics, carrier revenue needs, and alternatives to the increases (App. 44–46, 53–55, 70–82, 91, 94, 104, 106, 113–116, 150–157, 190–191). We submit that this inquiry into the effect of the underlying rate structure was entirely sufficient for purposes of the peculiarly limited issues to be decided by the Commission in a general revenue proceeding. See pp. 18–35, *supra*, and pp. 43–46, *infra*.

The district court, however, held that the impact statement's "most fundamental and important deficiency" (J.S. App. A, p. 34a) was "the limitation of its analysis to the marginal impact of the most recent rate increase with no discussion of whether the underlying rate structure itself significantly affects the environment" (*ibid.*). Thus, by effectively prohibiting the Commission from approving a general rate increase

until it has conducted a complete analysis of the underlying rate structure, the district court's holding would force the Commission either to abandon general revenue proceedings altogether (notwithstanding the statutory authorization of such proceedings in Section 15(7)) or to consider in them matters more appropriately at issue in proceedings such as Ex Parte 270, the Commission's current investigation of the entire rate structure. In so holding, the district court, in our view, acted contrary to this Court's previous admonition in this case that "NEPA was not intended to repeal by implication any other statute" (412 U.S. at 694).

The decision to approve a general rate increase before definitively resolving all questions relating to a possible need for restructuring the rail freight rate system was, we submit, plainly within the Commission's discretion. As this Court definitively held in *American Lines* v. *Louisville & Nashville R. Co.*, 392 U.S. 571, 592, the Commission must be left with reasonable latitude to decide in what kinds of proceedings it will address complex rate questions:

> Given the fact that * * * the Commission was to exercise its informed judgment in ultimately determining what method of costing was preferable, it is clear that the District Court also erred in refusing to permit the Commission to exercise that judgment in a proceeding it reasonably believed would provide the most adequate record for the resolution of the problems involved. We can see no justification for denying the Commission reasonable latitude to decide

fects resulting from a general rate increase is that "a general rate increase would allegedly cause increased use of nonrecyclable commodities as compared to recyclable goods, thus resulting in the need to use more natural resources to produce such goods * * * ." *S.C.R.A.P., supra,* 412 U.S. at 688. The critical issue, therefore, is whether the movement of scrap is in fact retarded by relatively small increases in the freight rates for all classes of commodities. The Commission, after full analysis of all evidence currently availabe, concluded that the movement of scrap is insensitive to minor rate changes.

Because the principal controversy centered upon iron and steel scrap, the Commission gave primary attention to those commodities. The Commission found that ferrous scrap prices fluctuate in a pattern not correlated to the underlying transportation rates (J.S. App. D, p. 65d). For example, between 1968 and 1973 the Commission authorized a 6% general increase effective in November 1969; a 6% increase effective in November 1970; and an 11% increase effective in April 1971 (Ex Parte 262, 265, and 267). During that period, according to *Metal Statistics 1973,* published by American Metal Markets, N.Y., the price of scrap fluctuated as follows:

No. 1 heavy melting scrap steel (composite average of prices at Pittsburgh, Philadelphia and Chicago)

[In dollars per gross ton]

	1968	1969	1970	1971	1972	As of Sept. 26, 1973 *
Annual average	25.94	30.56	44.95	34.46	36.63	58.83
High	31.62	35.36	46.04	40.81	41.97	
Low	23.11	26.33	35.95	31.08	33.09	

* Quotation Published in Daily American Metal Market.

Thus, despite freight rate increases throughout the period the price of scrap fluctuated, with the high price of 1970 exceeded only by the 1973 price. Apparently market factors other than freight rates are primarily responsible for scrap costs.[12] Moreover, freight rate increases are a relatively small portion of scrap costs (J.S. App. D, p. 63d) and are considerably smaller than the year to year or even month to month variations in price, which range as high as $8.64 per ton over short terms during which freight rates have remained constant (J.S. App. D, pp. 66d–67d).

In fact, as the scrap industry itself has admitted in other contexts, rail transportation rates are not critical. The demand schedule for scrap, not freight rates, is the primary determinant. Dr. Herschel Cutler, Executive Director of the Institute of Scrap Iron and Steel, stated in recent testimony to Congress that the problem of recycling ferrous scrap will not be solved until the steel industry starts buying more scrap (App. 266). With respect to iron and steel scrap, the Commission considered in detail the manufacturing process, with particular attention to the technology the scrap and the ways in which it can be used in competition with virgin ferrous materials (App. 70–82). As the Commission found in its impact statement, technological limitations unrelated to transportation inhibit greater use of scrap.

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[12] In the scrap industry the seller pays the freight charges (J.S. App. D, p. 64), so that a freight rate increase given ordinary and stable demand schedules, would increase the delivered price of scrap by slightly less than the increase in rates.

increase will "presumptively aggravate" environmental problems if the underlying rate structure "contributes to the degradation of our environment" (J.S. App. A, pp. 34a–35a). This, however, begs the important question whether the underlying rate structure does so discriminate.[18] The Commission examined the evidence on a preliminary basis and concluded that it does not (see pp. 32, 40, *supra*). It was improper for the district court, on the basis of an unsupported suspicion that more evidence might prove the Commission wrong, to order the Commission to create that additional evidence and to postpone the rate increases until it had done so. The Commission's decision to allocate to Ex Parte 270 the gathering of that additional evidence should be sustained unless arbitrary or capricious—and the Commission's preliminary determination that the basic rate structure was not seriously defective was sufficient under that standard.

As explained *supra,* pp. 21–22, in general revenue proceedings the Commission determines whether the carriers' collective revenue needs require a rate increase in order to provide them with adequate rates of return and to provide the Nation with adequate transportation. If the carriers demonstrate that such relief is consistent with the public interest the Commission will permit them to file tariffs to generate the needed

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[18] In any event, an across-the-board percentage increase in freight rates which does not exceed the percentage increase in other costs caused by inflation would not "aggravate" any existing disparity. And here the Commission's decision to limit price increases on nonferrous scrap to three percent tended to improve its position vis-a-vis virgin materials.

revenue. But in this sort of proceeding the Commission does not determine the reasonableness of any particular rate, nor does it consider the rate relationships of one commodity class to another—or even the revenue needs of a particular railroad (J.S. App. D, pp. 16d–17d). The procedure is expeditious and effective to ameliorate a revenue deficit precisely because it does *not* involve consideration of all possible variables. If the Commission were compelled to increase the number of different disputes that must be resolved in every general revenue proceeding, it would be unable to complete its work in the seven months allowed by Section 15(7). The Commission's current study of the entire rate structure, Ex Parte 270, *Investigation of Railroad Freight Rate Structure,* was commenced in 1970 and is still some years from completion. It has only recently produced an environmental impact statement, served August 2, 1974, in Sub-Nos. 5 and 6, concerning iron ores and scrap iron and steel. This impact statement alone consumes 313 pages and was produced only with the help of a special appropriation from Congress, a "special counsel" and staff devoted to this single task, and, for only the second time in the Commission's history, the appointment of a Commissioner as "Coordinator" in charge of the proceeding. Additional impact statements are forthcoming.

It was thus entirely appropriate for the Commission to conclude, in Ex Parte 281, that it would confine most of its attention to the marginal effects of the rate increases, while leaving to Ex Parte 270 the full

study that is required from time to time. It would be impractical for the Commission to attempt to duplicate, in every general revenue proceeding, the effort expended in Ex Parte 270;[19] nor would it be proper for the Commission to impose on the financially hard-pressed railroads a "moratorium" on rate increases until Ex Parte 270 is completed. The requirement of such a moratorium here not only would be inconsistent with the Commission's discretion to determine the appropriate proceeding in which to consider a particular issue, but it would be contrary to Section 15(7), which provides that rate increases become effective unless the Commission affirmatively declares them unlawful. Cf. *American Telephone and Telegraph Co.* v. *Federal Communications Commission*, 487 F. 2d 865 (C.A. 2).

In sum, there was no warrant for the district court's order to the Commission to reexamine the railroad rate structure in Ex Parte 281. It interfered with discretion reserved to the Commission and, if required, would virtually nullify the Commission's authority to entertain general revenue proceedings.

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[19] Nor would it necessarily be desirable for the Commission thoroughly to reexamine the rate structure on every available occasion. Most governmental decisions are made at the margin, partly for the very practical reason that governments do not operate on the maximum conceivable information, but on an amount that usefully can be generated and used in the time available and at reasonable cost. See generally Lindblom, *The Science of "Muddling Through,"* 19 Pub. Admin. Rev. 79 (1959).

III. THE COMMISSION WAS NOT REQUIRED TO CONDUCT ORAL HEARINGS AFTER PUBLICATION OF THE IMPACT STATEMENT

The district court held that, because Section 102 (2)(C) of NEPA provides that the environmental impact statement "shall accompany the proposal through the existing agency review processes," there is a "strong presumption" that the Commission was required, before reaching a decision, to conduct additional oral hearings after it had issued a draft impact statement, received comments, and settled on a final impact statement. See J.S. App. A, pp. 42a–43a.

A. GENERAL REVENUE PROCEEDINGS ARE RULEMAKING PROCEEDINGS AND REQUIRE NO ORAL HEARINGS

The requirement in Section 102(2)(C) that the impact statement "accompany" the agency's "proposal" through the "existing" agency stages of "review" does not support the district court's conclusion here. Because of the nature of the Commission's general revenue proceedings, the agency itself makes no "proposal" for action, and it conducts no intra-agency "review" of an initial decision. This provision of NEPA has obvious application to situations where an agency publishes a proposal for federal action and then holds public hearings on the proposal it has published. And the requirement that the impact statement "accompany" the "proposal" through existing review procedures can also reasonably be applied to situations where an agency has two tiers of review, with a hearing examiner making an initial decision,

and the agency hearing appeals. It is from the latter paradigm that the district court drew its analogies. In *Calvert Cliffs' Coordinating Committee* v. *Atomic Energy Commission,* 449 F. 2d 1109 (C.A.D.C.); *Greene County Planning Board* v. *Federal Power Commission,* 455 F. 2d 412 (C.A. 2), certiorari denied, 409 U.S. 849; and *Harlem Valley Transportation Association* v. *Stafford,* 500 F. 2d 328 (C.A. 2), courts have required agencies that employ administrative law judges to make an initial decision in an adjudicative proceeding to prepare an environmental impact statement before the first hearings are held, so that the impact statement can "accompany" other papers through the existing "review" process.

However suitable this procedure may be in such two-stage administrative proceedings, it has no proper application to the Commission's general revenue proceedings. These proceedings do not involve intra-agency review within the scope of Section 102(2)(C). In a Section 15(7) general revenue proceeding the initial and only agency decision is made by the Commission itself. There are no intermediate agency decision makers, nor are there any agency "review" procedures. In the absence of such procedures, we submit, there was no violation of NEPA, which expressly refers to "existing" review procedures and does not compel the Commission to create new levels or stages of intra-agency review.

This conclusion follows from the fact that general revenue proceedings under Section 15(7) are rule-making, conducted pursuant to Section 553 of the Ad-

ministrative Procedure Act, 5 U.S.C. 553. Such proceedings do not require oral hearings or intermediate stages of agency review. *United States* v. *Florida East Coast Ry. Co., supra,* 410 U.S. at 236–238; *United States* v. *Allegheny-Ludlum Steel Corp., supra,* 406 U.S. at 756–758. Cf. Note, *The Judicial Role in Defining Procedural Requirements for Agency Rulemaking,* 87 Harv. L. Rev. 782, 790–796 (1974).

Nor is there any independent requirement in NEPA that an agency hold hearings on environmental issues. It need do so only if such hearings are part of the "existing" process of "review." See *City of New York* v. *United States, supra,* 344 F. Supp. at 939–940. As the Ninth Circuit has explained:

> To hold in the abstract that meaningful public participation in the NEPA process cannot exist unless public hearings are held subsequent to the issuance of a draft environmental impact statement and prior to the preparation of the final document would be to substitute our judgment for that of Congress. It is true that the legislative history of NEPA indicates that the desire for a greater degree of responsiveness by administrative decision makers was one factor in the passage of NEPA. Despite this concern, however, there is no express provision in NEPA requiring administrative hearings as a procedural step in the preparation of § 102(2)(C) environmental impact statements. [*Jicarilla Apache Tribe of Indians, supra,* 471 F. 2d at 1286; footnote omitted.]

The district court's suggestion (J.S. App. A, p. 42a) that oral hearings are *de facto* part of the Commis-

sion's "existing" review procedure in general revenue proceedings is incorrect. Oral hearings—which are most useful for cross-examination or the development of facts or issues that cannot be exposed adequately in writing—often are useful for some issues in a particular case but not for other issues. The Commission frequently limits oral hearings in a particular case to specific issues, and, indeed, a majority of all Section 15(7) proceedings involving rate proposals are handled with no oral hearings at all.[20] There is nothing peculiar to environmental issues that makes them unsuitable for written presentation. The most persuasive environmental arguments tend to be in the form of complicated data that is quite unsuitable for oral presentation. Accordingly, even though an oral hearing was held at an earlier stage of this case, there is no basis for requiring the Commission to hold additional oral hearings concerning the environmental impact statement on the ground that such hearings are a regular part of the Commission's "existing" process of "review" in such cases.[21]

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[20] Of all Commission proceedings under Section 15(7) during calendar 1973, there were oral hearings in 55 and no hearings in 123 cases. Of more recent general revenue proceedings oral hearings have been allowed as follows: Ex Parte 295—limited hearings for cross-examination; Ex Parte 299—unlimited oral hearings; Ex Parte 303—no hearings; Ex Parte 305—no hearings.

[21] Moreover, all interested persons and protestants had an opportunity at the hearings held on June 15 and 16, 1972, to make oral presentations concerning potential environmental effects.

B. THE COMMISSION MAY CONSIDER ENVIRONMENTAL EFFECTS WITHOUT "STARTING AGAIN"

Once it is concluded that the Commission is not required to hold oral hearings on an impact statement, the foundation for the district court's directive (J.S. App. A, pp. 24a–25a) to the Commission to start its proceedings from the beginning vanishes. Because general revenue proceedings are rulemaking, the only apparent "beginning" to which the Commission could return here would be an oral hearing.

Even if there was another relevant "starting point" to which the Commission could return, it was unnecessary for it to do so. The Commission's impact statement, which we have demonstrated *supra* was adequate, concluded that there were no significant environmental consequences of the across-the-board increase. It would be extravagantly wasteful, and unfair to the parties, for the Commission to begin its proceedings over again in light of its discovery that there were no serious environmental effects.

A requirement to begin "over again" can be meaningful only if it would inject into the "early" stages of the Commission's consideration factors that previously were missing and might affect the outcome. The record here discloses that environmental possibilities were in fact considered at the earliest possible stages, from the time the Commission required the railroads to submit their own impact statement, through the Commission's first impact statement, through extensive consideration in the Commission's

decision of October 4, 1972. And because the Commission ultimately concluded that environmental effects were minimal, their more extensive consideration at an earlier stage could not have affected the outcome.

Finally, we submit that, even if there are technical defects in the Commission's compliance with NEPA, the extensive environmental inquiry conducted by the Commission constituted a good faith, integrated consideration of environmental effects along with the other pertinent considerations. In these circumstances technical defects in the impact statement itself do not disable the agency from rendering a valid final decision. See, *e.g., Life of the Land* v. *Brinegar,* 485 F. 2d 460 (C.A. 9), certiorari denied, 416 U.S. 961 (impact statement circulated after hearing, but extensive environmental inquiry before hearing); *Jicarilla Apache Tribe of Indians, supra; City of New York, supra; Hanly* v. *Kleindienst,* 471 F. 2d 823, 836 (C.A. 2), certiorari denied, 412 U.S. 908 (public participation in agency's environmental considerations).

In sum the Commission in this case, after taking an extended hard look at the pertinent environmental possibilities, and after issuing two impact statements, concluded that it had no cause to prohibit the railroads from increasing the transportation cost of scrap as well as the cost of virgin materials. The Commission's consideration of environmental effects, while undoubtedly not perfect, was, we submit, completely adequate to meet the requirements of NEPA.

CONCLUSION

For the foregoing reasons the district court's judgment should be reversed and the case remanded with directions to dismiss the complaint.

Respectfully submitted.

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DECEMBER 1974.

APPENDIX

Section 15(7) of the Interstate Commerce Act, 24 Stat. 384, as amended, 49 U.S.C. 15(7), provides:

> Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after

where it will resolve these complex issues, in addition to how it will resolve them. The action by the District Court here not only deprives the Commission of the opportunity to make the initial resolution of the issues but also prevents it from doing so in a more suitable context.

This Court has just recently held that the Federal Power Commission had the authority to fix rates on an area-wide basis rather than on an individual producer basis and that, in order to make such a procedure feasible, it had statutory authority to impose a moratorium upon rate increases by producers for a period of 2½ years after the setting of the area rate. *Permian Basin Area Rate Cases,* 390 U.S. 747 (1968). The basis for this holding was the principle that the "legislative discretion implied in the rate making power necessarily extends to the entire legislative process, embracing the method used in reaching the legislative determination as well as that determination itself." *Id.,* at 776. That principle is equally applicable to rate regulation carried out by the ICC, especially where, as here, the determination made on an interim basis is in general accord with both the legislative history of the statute involved and the results in prior cases decided by the agency.

See, also, *Wichita Board of Trade, supra,* 412 U.S. at 819–821.

Nothing in the language, legislative history, or purpose of NEPA removes from the Commission this "reasonable latitude to decide where it will resolve * * * complex issues, in addition to how it will resolve them." Indeed, the courts have generally recognized that NEPA does not take away the discretion

of an agency to determine in what proceeding it should address a particular question. For example, in *Sierra Club* v. *Callaway* (*Trinity River*), 499 F. 2d 982, the Fifth Circuit held that it was improper for the district court to compel an agency to analyze a series of construction projects in a single impact statement, rather than one project per statement. The Second Circuit, in *Ecology Action* v. *Atomic Energy Commission*, 492 F. 2d 998, 1002, held that the Atomic Energy Commission was entitled to develop definitive reactor safety criteria in a consolidated proceeding while continuing to license particular reactors. Accord, *Union of Concerned Scientists* v. *Atomic Energy Commission*, 499 F. 2d 1069, 1082–1085 (C.A.D.C.). And in *Jicarilla Apache Tribe of Indians, supra*, the Ninth Circuit allowed the Department of the Interior to proceed with consideration of particular dam projects prior to the completion of the long-range Southwest Energy Study, pointing out that if the courts were "to impose a requirement that an impact statement can never be prepared until all relevant environmental effects were known, it is doubtful that any project could ever be initiated" (471 F. 2d at 1280). See also *Life of the Land* v. *Brinegar, supra; Environmental Defense Fund, Inc.* v. *Armstrong*, 356 F. Supp. 131, 139 (N.D. Cal.).

B. THE COMMISSION PROPERLY EXERCISED ITS DISCRETION IN DECIDING TO CONSIDER THE OVERALL EFFECTS OF THE RATE STRUCTURE IN EX PARTE 270 RATHER THAN IN EX PARTE 281

The principal reason given by the district court for requiring the Commission to undertake a full survey of the rate structure was that an across-the-board

involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

* * * * *

COMMISSION'S SPECIAL ENVIRONMENTAL RULES, 49 C.F.R. 1100.250, 340 I.C.C. 431, PROMULGATED PURSUANT TO 42 U.S.C. 4332(2)(B), PROVIDE:

SPECIAL RULES PERTAINING TO ALL PROCEEDINGS BEFORE THE COMMISSION TO INSURE THAT ENVIRONMENTAL AMENITIES AND VALUES ARE GIVEN APPROPRIATE CONSIDERATION

(a) *Scope of special rules.* These special rules are applicable to all proceedings before the Commission. They are intended to assist the Commission in discharging its duties under the National Environmental Policy Act of 1969 (Public Law 91–190, 83 Stat. 852) which authorizes and directs that, to the fullest extent possible, the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies for the protection of the environment declared in that act.

(b) *Detailed environmental statement.* (1) It shall be the general policy of the Interstate Commerce Commission to adopt and adhere to the objectives and

aims of the National Environmental Policy Act in performing its regulatory duties and powers under the Interstate Commerce Act and related statutes. Among other things, the National Environmental Policy Act requires, to the fullest extent possible, a detailed environmental statement in all reports and recommendations on legislative proposals and other major Federal actions which will significantly affect the quality of the human environment.

(2) In compliance with this requirement, a detailed environment statement will be made when the regulatory action taken by the Commission under the applicable statutes will have such a significant environmental impact. The detailed statement, which statement shall be made as part of the initial decision in the proceeding and shall become final (with or without modification) when a final decision or order is entered by the Commission, shall fully develop the five factors listed below, among other relevant factors including the justification of a proposed action as compared to its alternatives. The following factors are listed merely to illustrate the kinds of values that *must* be considered in the statement, and in no respect is this listing to be construed as covering all factors relevant to the disposition of any particular proceeding:

(i) The environmental impact of the requested action;

(ii) Any adverse environmental effects which cannot be avoided should the requested action be granted;

(iii) Alternatives to the requested action;

(iv) The relationship, if any, between local short-term uses of man's environment and maintenance and enhancement of long-term productivity; and

(v) Any irreversible and irretrievable commitments of resources which would be involved in the requested action should it be granted.

The procedures set forth in this rule are intended to encourage, to the fullest extent possible, public and governmental participation in those formal proceedings which might significantly affect the quality of the human environment, and to the end of insuring that a complete record is developed which will enable the Commission to consider fully the environmental impact of a contemplated action.

(c) *Applicable general and special rules not affected.* The Commission's general and/or special rules heretofore applicable to a proceeding shall remain in effect and govern the procedure therein. These special rules shall supplement the applicable existing rules.

(d) *Papers to show effect of subject matter of proceeding on the quality of human environment.* (1) In all initial papers filed with this Commission by a party, there shall be filed a statement indicating the presence or absence of any effect of the requested Commission action on the quality of the human environment. If any such effect is alleged to be present, the paper shall include, but not be limited to, statements relating to each of the relevant factors set forth in paragraph (b)(2)(i)–(v) of this section.

(2) In all proceedings determined or alleged to have a significant effect on the quality of the environment, all parties shall file statements submitting information relating to the relevant factors set forth in paragraph (b)(2)(i)–(v) of this section.

(e) *Notice to appropriate governmental agencies.* (1) All papers submitted in compliance with these rules, and affirmatively alleging a substantial environmental impact, beneficial or adverse, shall be served by the person or persons submitting it on those governmental bodies given notice pursuant to subparagraph (1) of this paragraph. The person or persons submitting the statement also shall supply 10 copies of

the statement to the Council on Environmental Quality.

(2) A notice of all proceedings determined to have a significant effect on the quality of the human environment will be transmitted by the Commission as promptly as possible to the Council on Environmental Quality and to appropriate governmental bodies—Federal, regional, State, and local—(as identified in the guidelines promulgated by the Council on Environmental Quality) with a request for public comments on the environmental considerations listed in paragraph (b)(2)(i)–(v) of this section.

(3) All interveners, including other Government agencies, taking a position on environmental matters shall file with the Commission an explanation of their environmental position, specifying any differences with the original party's detailed statement upon whichintervener wishes to make its views known, and including therein a discussion of that position in the context of the factors enumerated in paragraph (b) of this section. All interveners shall be responsible for filing 10 copies of their submission with the Council on Environmental Quality at the time they file with the Commission and shall also supply a copy of such submission to all participants to the proceeding. Nothing herein shall preclude an intervener from filing a detailed environmental statement. The Commission will consider all representations submitted prior to the final disposition of the proceeding.

(4) The views of the Council on Environmental Quality, if any, should be made in a written statement served upon the Secretary of the Commission and all parties of record.

(f) *Official notice.* The Commission may take official notice of any facts relating to the environmental situations before it. This shall include, but not be limited

to, scientific studies, governmental reports, and maps which have not been presented in evidence by any of the parties of record.

(g) *Determinations.* The determinations in all proceedings which investigate environmental issues should include an evaluation of the environmental factors enumerated in paragraph (b)(2)(i)–(v) of this section, and the views expressed in conjunction therewith by all persons making formal comment pursuant to the provisions of this section. Specific findings should be made in each such proceeding as to whether the relief sought is or is not environmentally advantageous.

(h) *Review of initial decision on environmental impact.* Any decision with respect to the environmental issue will be subject to Commission review in the same manner as other issues in the proceeding.

(i) *Proceedings in progress.* With respect to those proceedings already in progress, the Commission recognizes that it may not be possible to comply fully with the procedures outlined herein and, in particular, that it may not be possible in every instance to include within the record all of the material relating to the environmental impact of the contemplated action which might otherwise be developed. Nonetheless, it is the policy of the Commission to apply these procedures to the fullest extent possible to proceedings already in progress.

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it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accuate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Section 102 of the National Environmental Policy Act of 1969, 83 Stat. 853, 42 U.S.C. 4332 provides in relevant part:

> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality * * *, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 73-1966 and 73-1971

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; AND ABERDEEN AND ROCKFISH RAILROAD CO., *et al.*,

Appellants

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES ("SCRAP"); ENVIRONMENTAL DEFENSE FUND, NATIONAL PARKS AND CONSERVATION ASSOCIATION AND IZAAK WALTON LEAGUE OF AMERICA ("EDF *et al.*"); INSTITUTE OF SCRAP IRON AND STEEL ("ISIS"); AND NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES ("NARI")

Appellees

On Appeal from the United States District Court for the District of Columbia

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BRIEF OF SCRAP, AND EDF *ET AL.*

OPINIONS BELOW

The opinion of the three-judge district court (Gov.J.S. App. A, pp. 1a-56a) is reported at 371 F.Supp. 1291.

The Interstate Commerce Commission's opinion and order dated September 27, 1972, and served October 4, 1972, in *Ex Parte 281, Increased Freight Rates and Charges*, 1972 (Gov.J.S. App. D) is reported at 341 I.C.C. 290. The Commission's final environmental impact statement on *Ex Parte 281* (A.[1] 10-199) is reported at 346 I.C.C. 88. The Commission's order of May 2, 1973 (Gov.J.S. App. E) is not reported.

JURISDICTION

Jurisdiction is in dispute. Appellants allege jurisdiction under 28 U.S.C. § 1253. Appellees contest that allegation on the ground that this appeal is not from the grant or denial of an injunction, as required by § 1253, but rather from a judgment which both the lower court and the Government have characterized as "a declaration." 371 F. Supp. at 1295; Gov. Br., p. 12. See, *e.g.*, *Mitchell* v. *Donovan*, 398 U.S. 427, 430-31 (1970); *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 154 (1963).

QUESTIONS PRESENTED

1. Whether appellants are entitled, under 28 U.S.C. § 1253, to maintain a direct appeal which is not from the grant or denial of an "injunction," but rather from the grant of a "declaration" which expressly omits injunctive relief.

2. Whether general revenue orders of the Interstate Commerce Commission, issued pursuant to 49 U.S.C. § 15 (7), are immune from judicial review to determine whether the Commission has complied with relevant statutory procedural mandates.

3. Whether, in reviewing an environmental impact statement prepared pursuant to § 102(2)(C) of the Na-

[1] References to "A" are to the Joint Appendix in this Court.

tional Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(2)(C), the reviewing court may determine the adequacy of the contents, as opposed to the mere form, of the impact statement.

4. Whether the court below clearly erred in finding on the evidence before it that an environmental impact statement on a proposed percentage increase in rail freight rates was inadequate, where:

(a) Four of the five federal agencies which reviewed it in draft form pursuant to § 102(2)(C) of NEPA concluded that it contained insufficient information on the environmental impact of the proposed action to afford a basis for informed decisionmaking, and the fifth agency concluded that it inadequately considered "alternatives to the proposed action;" and

(b) The Commission did not attempt to cure the inadequacies asserted by these other agencies; and where

(c) Such impact statement failed to consider the effect of the proposed increase in perpetuating and increasing inequities in the existing rate structure, between primary and secondary materials.

5. Whether the court below clearly erred in finding that the oral hearings which the Interstate Commerce Commission customarily holds in its general revenue proceedings, conducted pursuant to 49 U.S.C. § 15(7), are part of the "existing agency review processes" for purposes of § 102(2)(C) of NEPA, so that an environmental impact statement must "accompany the proposal" for a general revenue order through such a hearing.

STATUTES INVOLVED

The following statutes are set out in the appendix, *infra*, pp. 1a-5a:

—28 U.S.C. § 1253;

—28 U.S.C. §§ 2321-25, as these sections stood prior to amendment on January 2, 1975, by P.L. 93-584;

—Public Law 93-584 (in pertinent part), amending 28 U.S.C. §§ 2321-25; and

—Section 102 of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332 (in pertinent part).

STATEMENT OF THE CASE

A. The Declaration Appealed From

This case is here on direct appeals, under 28 U.S.C. § 1253, from "a declaration" granted by a three-judge district court. See 371 F.Supp. at 1295; Gov.Br., p. 12. This declaration, now a year old, affects, at most, the burden of proof in hypothetical subsequent proceedings which may never be held. The lower court declared the invalidity of two orders entered by the Interstate Commerce Commission in *Ex Parte 281*, a general revenue proceeding,[2] and remanded the case to the Commission for reconsideration. The invalidated orders gave ICC approval to a round of increases in rail freight rates.[3]

But the lower court *did not enjoin collection of the increased rates*, which the Railroads have collected exactly

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[2] The Commission's general revenue proceedings are conducted pursuant to § 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7). A general revenue order "does no more than shift the burden of proof from the carrier to the shipper" in subsequent rate reparation proceedings, *if any*, under § 13(1) of the Act, 49 U.S.C. § 13(1). See Gov.Br., p. 5, n. 4. Invalidating such an order does no more than shift the burden of proof back to the carrier. Either effect is purely academic in the absence of a subsequent proceeding in which the burden of proof matters.

[3] The Commission's order of October 4, 1972, directly approved the rate increases. Its order of May 2, 1973, terminated *Ex Parte 281*.

as if the district court had never acted. Nor did the district court prevent the Commission from approving, or the Railroads from collecting, subsequent general rate increases, of which there have been three: *Ex parte 295* (1973), *Ex Parte 299* (1974), and *Ex Parte 305* (1974).[4]

As the lower court observed (371 F.Supp. at 1308, n. 50), and as no party has disputed:

> "The only consequence of our vacating the Commission's orders pending reconsideration of the rate increases 'is that the railroads may not rely, in some subsequent proceeding, on a Commission finding that the proposed rates were just and reasonable. In an action for reparations, for example, the railroads could not gain any benefit from the purported Commission approval of the increases.' Atchison, Topeka & Santa Fe R. Co. v. Wichita Board of Trade, . . . 412 U.S. [800] at 818. . . ."

The Railroads do not claim to have suffered pecuniary loss on this account in any such "subsequent proceeding." It does not even appear that such a "subsequent proceeding" has ever taken place, in the year since the lower court's judgment. In a practical sense the effect of the lower court's order on rates charged in the real world seems to have been nil.

The lower court declared the Commission's orders invalid on the ground that the Commission had failed, before entering them, to comply with § 102(2)(C) of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(2)(C). Section 102(2)(C) requires, *inter alia*, that:

> "all agencies of the Federal Government shall— * * *
>
> "(C) include in every recommendation or report on proposals for . . . major Federal actions significantly

[4] None of these general revenue orders has yet been officially reported.

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* References to "ERC" are to the Environment Reporter Cases, published by the Bureau of National Affairs.

> affecting the quality of the human environment a detailed statement by the responsible official. . . ."

The "detailed statement" required by § 102(2)(C) must discuss the "environmental impact" of the proposed action, alternatives thereto, and certain other considerations.

The lower court declared that the impact statement prepared by the Commission in *Ex Parte 281* was inadequate to satisfy the Act. In so doing, the lower court relied in part on overwhelmingly negative appraisals made by five federal agencies with relevant environmental expertise, which reviewed the statement in draft form pursuant to the specific statutory requirement of § 102(2)(C).

The preponderant criticism of the impact statement made by these five reviewing agencies was that it contained so little "hard" information—as opposed to unsupported conclusions—about the environmental impact of the rate increases at issue in *Ex Parte 281* that it afforded no basis for informed decisionmaking. Thus the Environmental Protection Agency placed the draft statement in its lowest category, "Inadequate" (A. 707); the Department of the Interior commented that "the impact statement does not appear to us to meet the requirements of [NEPA] for providing a careful multidisciplinary examination of the environmental effect[s]" (A. 702); the Council on Environmental Quality commented that "deficiencies [pointed out earlier] have not been corrected," and that "the Commission has devoted little effort to analyzing alternative actions . . ." (A. 705); and the Department of Commerce commented that the draft "simply [gave] the Commission's judgment . . . without in-depth supporting documentation," that this was "insufficient," and that the Commission's discussion was internally inconsistent and marked by "circular reasoning." (A. 576-79).

The lower court also found that the Commission had not attempted to improve its analysis in light of these expert agency criticisms, or otherwise to respond to them, but that it had simply denounced the other agencies, and re-adopted almost verbatim as a final impact statement the text which they had found inadequate as a draft. 371 F. Supp. at 1302. The Commission's response, after receiving the comments of the reviewing agencies, had been simply to condemn as "one-dimensional" the views of

> "the governmental interests [which] together with the private environmental sector seek to demonstrate that this Commission should investigate environmental matters and effects more extensively with our own resources. It is such one-dimensional approaches as these that we are knowingly seeking to avoid." (A. 18).

Finally, the lower court found that the impact statement limited its "analysis to the marginal impact of the most recent rate increase with no discussion of whether the underlying rate structure itself significantly affects the environment," 371 F.Supp. at 1304, and thus failed altogether to address the contention, vigorously asserted by the Council on Environmental Quality and the Environmental Protection Agency, among others, that (in the CEQ's words):

> "across the board percentage freight rate increases widen existing differentials between virgin and secondary materials, thus reducing the level of recycling to a point below that which would have been obtained in the absence of a rate increase." (A. 567)[5]

The rate increases approved in *Ex Parte 281* averaged 4.1 percent on a wide variety of commodities, including

[5] The Environmental Protection Agency determined that "there is evidence to indicate that the present rate structure discriminates against the movement of secondary materials." (A.708).

ferrous scrap being transported for recycling.[6] The Commission's impact statement concluded that none of the proposed rate increases would have a significant environmental effect, *i.e.*, that it would not affect the quantity of scrap shipped and recycled. At the same time, the Commission claimed that limiting the increase on nonferrous scrap to 3 percent (which it did) "will . . . have a beneficial effect on the environment. . . . [T]he holddown here imposed should encourage the movement and recycling of these commodities." (Gov.J.S., p. 60-d.)[7] The Environmental Protection Agency commented that these positions were mutually contradictory, "indicating that rate increases on secondary materials are arbitrary actions. . . ." (A. 574).

B. Background Facts

The present appeals are the most recent chapter in a long-protracted litigation through which appellees have sought to require a reluctant Commission to examine the environmental impact of the rail freight rate structure authorized by the Commission, and to prepare environmental impact statements, pursuant to § 102(2)(C) of NEPA, on the Commission's actions authorizing changes in that rate structure. Appellees have particularly sought to have the Commission deal, through the impact statement procedure, with the issue of whether freight rate increases approved on goods shipped for recycling can be reconciled with the Commission's specific mandate under § 101(b)(6) of NEPA, 42 U.S.C. § 4331(b)(6), to "enhance the quality of renewable resources and approach the maximum attainable recycling of depletable

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[6] Commissioner Deason, dissenting in part, and Commissioner Brown, concurring in part, opposed any increases on recyclable materials. (Gov.J.S., pp. 87d-88d; *see also* A.237-38).

[7] Compare p. 11, *infra*.

resources," in view of evidence that the basic rate structure "discriminates against . . . secondary materials."[8] At the outset of this litigation, some two-and-one-half years after the effective date of NEPA, the Commission had filed exactly one impact statement pursuant to NEPA, and that only after it had been specifically ordered to do so by a court.[9] The Commission sought to justify its long-standing non-observance of the Act by including in "literally hundreds" of its regulatory orders a "negative statement or finding" that the action taken would have no significant environmental impact.[10] The court below determined that these routine "findings" were not based on "detailed study by the Commission," but were merely a "transparent . . . ruse", "no more than glorified boilerplate," and a "stratagem for avoiding the requirements of NEPA."[11]

Under the spur of this and other[12] litigation, the Commission has abandoned this "stratagem," at least for purposes of the present case. Thus the Commission no longer contests the need for environmental impact statements on its general revenue proceedings. The Commis-

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[8] See note 5, *supra*, and accompanying text.

[9] See *SCRAP* v. *United States*, 346 F.Supp. 189, 195, n. 8 (D.D.C. 1972): "* * * The Commission assured us at oral argument that it had been following NEPA and issuing impact statements as a matter of course. However, in a subsequent communication to the court, the Commission conceded that in the 2 [and one-half] years since the effective date of NEPA it has issued only one impact statement, and that under judicial compulsion. *See* City of New York v. United States, E.D.N.Y., 337 F.Supp. 150 (1972)." The *City of New York* impact statement did not concern rates; at the outset of this litigation the Commission had *never* prepared an impact statement on any rate proceeding.

[10] *SCRAP* v. *United States*, *supra*, 346 F.Supp. at 200, n. 16.

[11] *Id.* at 200, n. 16, and at 201, n. 17 and accompanying text.

[12] See *Harlem Valley Transp. Ass'n* v. *Stafford*, 500 F.2d 328 (2d Cir. 1974) *aff'g* 360 F.Supp. 1057 (S.D.N.Y. 1973); *City of New York* v. *United States*, 337 F.Supp. 150 (E.D.N.Y. 1972).

sion does, though, bring to this Court its quarrel with the court below, with appellees, and with other federal agencies, as to the adequacy of the particular impact statement in issue here, and as to the need to prepare an impact statement *prior* to the oral hearing which the Commission customarily holds in a general revenue proceeding.

Similarly, the Commission has recently made belated progress in recognizing that the freight rate structure does have environmental consequences, and that, in the Commission's words, an across-the-board percentage increase in the rates has the effect of "perpetuat[ing] and increas[ing] any inequities that may exist in the rail rate structure between primary and secondary commodities." [13] In the environmental impact statement prepared in *Ex Parte 295*, a general revenue proceeding *subsequent* to the one in issue,[14] the Commission estimated that a 3 per cent rail freight increase on goods being shipped for recycling [15]—rather than having no significant environmental impact, as claimed in the Commission's previous boilerplate "findings," and in the *present* impact statement—would mean the following with respect to non-ferrous metals alone:

> "[A]n estimated [additional] 3,097 tons of metal will be annually required from virgin ores.[16] An

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[13] See text at n. 19, *infra*.

[14] ICC, Final Environmental Impact Statement, *Ex Parte 295* (Sub-No. 1), Increased Freight Rates and Charges, 1973—Recyclable Materials (June 3, 1974) (lodged with the Clerk of this Court).

[15] As compared with the previous increase of up to 5 percent (3 percent on non-ferrous scrap) which is involved here (A. 55; *see* Gov. J.S., p.60d).

[16] The quantity of "virgin ores" required would appear to be greatly in excess of the quantity of "metal." For example, the Commission notes that "for every ton of copper recovered from United States ores of 0.55% content, nearly 200 tons of waste must be disposed." *Ex Parte 295* Impact Statement, p. 2-13.

> increased yearly power consumption of 21.8 million kilowatt hours can be expected, with an increase in pollutant emissions of about 15 tons per year." [17]

With respect to iron and steel scrap, the Commission estimated in *Ex Parte 295* that a rail freight increase of *3 percent* on scrap being transported for recycling will result in:

> "an expected annual decrease in recycled scrap of . . . 67,000 tons . . . , resulting in additional mining requirements for 156,000 tons of domestic ore, 58,300 tons of coal and 14,700 tons of limestone and dolomite. The processing of additional ore is expected to require an increase of 324 thousand megawatt hours; increased pollutants emitted are estimated as 4,500 tons (on a controlled basis)." [18]

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[17] *Ex Parte 295* Impact Statement at xiii-xiv. See discussion in n. 18 *infra*.

[18] *Ex Parte 295* Impact Statement, *supra*, at p. xiv. To put these figures on power consumption in perspective, the average American residential customer (*i.e.*, the average *household*, not the average *individual*) used 8,079 *kilowatt* hours in 1973 (Edison Electric Institute, *Statistical Yearbook of the Electric Utility Industry for 1973*, p. 2); thus 345,800 *megawatt* hours (adding the ICC's figures for increased consumption attributable to rate increases on both ferrous and non-ferrous *metal* scrap) would provide for the electrical consumption of approximately 43,000 American households. In 1973, assuming the use of fossil fuels, 10,429 BTUs were required to generate one kilowatt hour. (*Statistical Yearbook*, *supra*, p. 41, Table 41-S.) A barrel of oil provides 5,800,000 BTUs (Energy Policy Project of the Ford Foundation, *A Time to Choose, America's Energy Future*, p. 5, n. a. (1974).) Thus, in order to generate 345,800 megawatt hours, roughly 622,000 barrels of oil (at current prices of about $10 per barrel) would be required. The addition of new electrical capacity costs roughly $500 per kilowatt. (*A Time to Choose*, *supra*, p. 74, Table 12.) In order to calculate the amount of capacity which would have to be added to provide an additional 345,800 kilowatt hours (or which would not have to be added were 345,800 kilowatt hours saved), it is reasonable to assume a reserve margin of 20 percent, and a load factor of 60 percent. Thus, "a typical utility system must have an installed generating capacity about twice the average load demand." (See Federal Energy Administration, *Project Independence*, p. 124

Moreover, the Commission acknowledged in *Ex Parte 295* that:

> "In the long term, the effect of the proposed 3 per cent rate increase will be to perpetuate and increase any inequities that may exist in the rail freight structure between primary and secondary commodities. Such an effect applies particularly to waste paper and to non-ferrous metals for which the Interstate Commerce Commission has computed differentials in favor of primary materials[,]" [19]

and that:

> "[t]o the extent that [the proposed 3 percent rate increase] decreased the movement of scrap and brought about a corresponding increase in the consumption of virgin metal, there may be adverse effects on the environment . . . , relating not only to accumulation of solid waste but also to the secondary consequences of resource consumption, higher level of pollutants discharged during processing,[20] and—most of all—greatly increased demands for energy.[21] In this connection, strong arguments can be made, generally and qualitatively, that by increasing the

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(1974).) Assuming a 365-day year of 8,760 hours, roughly 79,000 kilowatts of capacity would be required. At $500 per kilowatt the cost would be $39,500,000. The Commission attempts to dismiss this increased power consumption (as well as the other expected impacts of a 3 percent increase on freight rates for recyclables) as "insignificant" (*Ex Parte 295* Impact Statement, p. xiii), but admits that this characterization is "necessarily" subjective. (*Id.*, p. 7-36.) Such a characterization, of course, is not within the Commission's historic area of expertise.

[19] *Id.* at xv-xvi.

[20] See n. 16, *supra*.

[21] For example, the Commission states that "the use of virgin ores in the production of aluminum requires approximately 20 times as much energy to produce as an equivalent amount of secondary metal." *Id.* at p. 2-3.

total costs of recycling, *raising the rail freight rates will significantly decrease scrap reclamation.*"[22] (Emphasis added.)

The impact statement in *Ex Parte 295*, moreover, implicitly conceded many of the flaws which the reviewing agencies, and the lower court, found in the present impact statement. For example, the Commission acknowledged that a principal analytical technique used in the present impact statement—an attempt to demonstrate the lack of connection between freight rates and scrap movements solely by reference to historical comparisons which took no account of other variables—was "unfair as well as imprecise." (*Id.*, p. 7-4).

C. The Present Controversy

Notwithstanding the Commission's belated progress in proceedings subsequent to this one, a number of issues remain for resolution by this Court. These issues are relatively narrow, simple and straightforward. Jurisdictional problems aside, they boil down to Nos. 3, 4, and 5 of the Questions Presented, pp. 2-3, *supra*.

One of the Commission's principal claims here is that it is impossible, in the context of this or any other general revenue proceeding, to produce an impact statement which considers not only the marginal effects of the rate increases then under consideration, "but also the basic rate structure upon which they are predicated." (Gov.J.S., p. 14). Despite this claim of impossibility, however, the Commission *did* issue, shortly after the judgment appealed from, a final environmental impact statement[23] which the Commission claims, in another proceeding, to be a thorough and adequate examination of the underly-

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[22] *Id.* at p. 2-19 (emphasis added).

[23] Impact statement, *Ex Parte 270*, Sub-Nos. 5 and 6 (lodged with the Clerk of this Court). See pp. 63-66, *infra*.

ing rate structure for ferrous scrap. The Commission characterizes ferrous scrap here as "the principal commodity at issue" (Gov.J.S., p. 14) and as "the major recycled waste product" (Gov.Br., p. 9). The Commission evidently decided not to adapt this existing study for use in complying with the mandate of the court below—but rather to insist in this Court on the impossibility of such compliance.

On December 2, 1974, the Council on Environmental Quality wrote to the Commission, saying that the CEQ is "concerned . . . over the apparent refusal by the Commission to use" this existing analysis:

> "in rate increase proceedings which are still ongoing, *such as Ex Parte No. 281* [the proceeding involved in the present case] and thus the continuing delay in applying an analysis of the underlying rate structure to the Commission's revenue proceedings." (Emphasis added.)

In the same letter the CEQ pointed out that:

> "The Commission has recently demonstrated its ability to develop this type of analysis. . . . And henceforth it should be a relatively simple matter for the Commission to update these analyses, and use them in connection with future rate increase proposals being investigated by the Commission."[24]

The Commission has been on notice at least since 1968 of government studies which concluded that transportation costs are a "principal constraint" on the recycling of certain types of scrap, and that:

> "Whatever the merits . . . of [a] plea for increased freight charges on iron and steel scrap may be, any such increase will add that much more difficulty to the job of clearing away the junk metal which al-

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[24] See pp. 6a-8a, *infra*.

ready clutters too much of our American landscape." [25]

The Commission has had five full years, since the effective date of NEPA, to prepare its own study of the environmental impact of the underlying rail rate structure, which could be periodically updated and adapted for use in impact statements on particular rate increases. Almost three of those five years have elapsed since the start of the present litigation. One of those five years has elapsed since the judgment of the court below, from which the present appeals are taken.

SUMMARY OF ARGUMENT

I.

The Court lacks jurisdiction of these appeals, which are not from the grant or denial of an "injunction," as required by 28 U.S.C. § 1253, but rather from the grant of relief which both the lower court and the Government have characterized as a "declaration." 371 F.Supp. at 1295; Gov.Br., p. 12. *Compare Mitchell* v. *Donovan*, 398 U.S. 427 (1970); *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963). The order appealed from has none of the essential elements of an injunction. No one has been enjoined. The effect of the lower court's order on appellants has been "totally noncoercive." *Mendoza-Martinez*, *supra*, at 155. As the lower court stated, and as no one now disputes, the *only* practical consequence of its order is that the Railroads are precluded from making an argument they might otherwise make in hypothetical administrative proceedings which have never actually occurred, and whose likelihood appears to have diminished with the passage of a year since the lower court's order.

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[25] Letter from Secretary of the Interior Stewart L. Udall to Hon. Paul J. Tierney, Chairman of the ICC, June 17, 1968. (This letter appears at pp. 69-70 of the Joint Appendix in *United States* v. *SCRAP*, Nos. 72-535 and 72-562.)

See 371 F.Supp. at 1308, n. 50. No rates have been enjoined, and the Commission has not been prevented from approving subsequent general revenue increases. The lower court's order is not an "injunction" under the canon of narrow construction applicable to 28 U.S.C. § 1253. *Compare Gonzalez* v. *Automatic Employees Credit Union*, No. 73-858, 43 U.S.L.W. 4025 (U.S. Dec. 10, 1974).

II.

The Commission's general revenue proceedings held under § 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7), are not, as the Railroads would have it, immune from judicial review to determine whether the Commission has complied with relevant procedural mandates. The Railroads contend that a party who seeks to enforce the Commission's duty to prepare a single environmental impact statement on a single general revenue proceeding covering literally thousands of rates must first initiate rate-by-rate reparation proceedings under § 13(1) of the Interstate Commerce Act, 49 U.S.C. § 13(1) and seek, through such proceedings, to obtain a separate impact statement on each challenged rate. The Commission conspicuously fails to join the Railroads in making this argument, and, indeed, has given its opinion that such a procedure would be administratively impossible (A. 21). In *Atlantic City Elec. Co.* v. *United States* and *Alabama Power Co.* v. *United States*, 400 U.S. 73 (1970), two cases not involving NEPA, the Commission vigorously disputed the Railroads' argument that general revenue proceedings are inherently unreviewable.[28] In those cases, the Court divided evenly on that issue. The practical consequence of adopting the Railroads' argument would be that at *no* stage could anyone obtain judicial review

[28] Brief for Appellees United States, *et al.*, Nos. 70-78 and 70-106 at 15-41.

of the procedural NEPA questions which might arise in a general revenue proceeding.

III.

A. The lower court applied the correct legal standard in reviewing the contents, as well as the mere form, of the Commission's environmental impact statement on *Ex Parte 281*, the general revenue proceeding in issue here. Not one single case decided in the five years since NEPA's enactment has adopted the rule proposed by the Railroads, that judicial review under NEPA be confined to determining whether a document exists which meets "the prescriptions of NEPA as to form" (R.R.J.S., p. 22). Not only is such a rule wholly at odds with the existing case law under NEPA; it is also at odds with this Court's recent holdings as to the matters relevant for judicial consideration in review of agency action. *See, e.g., Atchison, T. & S.F. R. Co.* v. *Wichita Board of Trade*, 412 U.S. 800 (1973); *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971). Again, the Government conspicuously fails to join with the Railroads on this issue.

B. The lower court properly applied a "rule of reason" in determining the adequacy of the Commission's impact statement. A fundamental requirement which has been consistently enforced under that rule of reason is that an impact statement must provide sufficient information on the environmental consequences of proposed federal action, and alternatives thereto, to allow informed decisionmaking.

C. Whether the present impact statement was adequate under that rule of reason is basically a factual issue. After consideration of various expert submissions (including the highly unfavorable comments of five federal agencies which reviewed the Commission's impact statement pursuant to the requirements of NEPA, § 102(2)

(C), 42 U.S.C. § 4332(2)(C)) the lower court found the impact statement inadequate to provide a basis for informed decisionmaking. Under F.R.Civ.P. 52(a), the factual determinations of a district court cannot be upset unless the reviewing court finds, "on the entire evidence" that they are "clearly erroneous." *United States* v. *U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

D. There is no basis here for finding, under the "clearly erroneous" standard or any other, that the lower court erred in finding the Commission's impact statement inadequate. Reversal of the lower court on this ground would require this Court to hold (a) that the federal agencies which reviewed the impact statement erred in determining that it was inadequate; (b) that the Commission was entitled to ignore the unfavorable judgment of these sister agencies without making a "good faith, reasoned . . . response," *Silva* v. *Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973); and (c) that, notwithstanding the contrary judgments of these sister agencies and the lower court, the impact statement did in fact contain sufficient information to permit informed decisionmaking.

IV.

The Court should not hold that the Commission has complied with NEPA in the absence of an adequate impact statement. In the words of Chief Judge Friendly (written with respect to this same Commission) "the integrity of NEPA" is at stake here. *City of New York* v. *United States*, 337 F.Supp. 150, 160 (E.D.N.Y. 1972) (three judge court). The Commission's non-compliance stems from a long-established pattern of obduracy which the Commission has maintained not only toward NEPA, the lower court and appellees, but also toward the federal environmental agencies, since the enactment of NEPA. The Court should take into account (a) that this is not a hard case which would warrant it in making bad law

(neither the Commission nor the Railroads having pointed to any practical hardship arising out of the lower court's judgment), and (b) that this is the Court's first plenary consideration of the requirements of NEPA § 102(2)(C). and that the Court's disposition of the case will necessarily have wide repercussions, not only in the few instances where an impact statement becomes the subject of litigation, but also in the many instances where the question is how seriously the agencies will continue to take NEPA.

V.

The lower court was clearly correct in finding, as a matter of fact, that an oral hearing was part of the "existing agency review processes" in *Ex Parte 281*, so as to require that the Commission's impact statement be made available in draft form prior to the hearing. NEPA, § 102(2)(C); *see* Council on Environmental Quality, *Guidelines: Preparation of Environmental Impact Statements*, 40 C.F.R. § 1500.7(d). The real issue is simply one of appropriate relief, *i.e.*, whether the Commission should be required, a year after the lower court's order, to hold another oral hearing in *Ex Parte 281* after the preparation of an adequate impact statement.

VI.

This is a case in which a great deal of water has clearly passed under the bridge since the illegalities in issue, and since the judgment of the lower court. Should this Court reach the merits, it should affirm that judgment. Appellants would still be able to return to the lower court to petition for modification of its decree in light of changed circumstances. F.R.Civ.P. 60(b)(5), (6). Indeed, one of the enduring mysteries of the case is the Commission's failure to do so in light of subsequent impact statements which implicitly conceded—and,

to a degree, cured—the blatant inadequacies of the statement in issue.

ARGUMENT

I. THIS COURT LACKS JURISDICTION OF THE PRESENT APPEALS.

Appellants [27] contend that this Court has jurisdiction of the present appeals pursuant to 28 U.S.C. § 1253, which provides for a direct appeal to the Supreme Court

> "from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit, or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

These appeals, however, are not from the grant or denial of an "injunction." Although appellees originally sought an injunction, and a three-judge district court was convened to consider that request under 28 U.S.C. § 2325 (since repealed),[28] the district court denied the requested injunction and no party now appeals from that denial. It is well established that a party which prevails as to the grant or denial of an injunction before a three-judge

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[27] Reply of the United States and Interstate Commerce Commission (Sept. 1974) ("Gov. Reply"); Reply of Appellant Railroads (Sept. 1974) ("R.R. Reply").

[28] Section 2325 required a three-judge district court in suits for "an interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission." It was repealed by P.L. 93-584, § 7 (Jan. 2, 1975). Under the new statutory scheme, "a proceeding to enjoin or suspend, in whole or in part a rule, regulation or order of the Interstate Commerce Commission shall be brought in the court of appeals . . .," P.L. 93-584, § 5, except that § 10 provides that "actions to enjoin or suspend orders of the Interstate Commerce Commission which are pending when this Act [P.L. 93-584] becomes effective shall not be affected thereby. . . ." The pertinent text of P.L. 93-584 appears at pp. 2a-3a, *infra*. The pertinent statutory scheme as it stood prior to P.L. 93-584 appears at pp. 1a-2a, *infra*.

court as—appellants did here—has no right of direct appeal on the other issues in the case. *Public Service Comm'n* v. *Brashear Freight Lines, Inc.*, 306 U.S. 204 (1939); see also *Gunn* v. *University Committee to End the War*, 399 U.S. 383, 389 (1970).

The present appeals were taken from a judgment which declared the invalidity of orders entered by the Interstate Commerce Commission in a general revenue proceeding. But the lower court specifically refused to enjoin collection of the increased freight rates authorized by these orders, and these rates are in fact being collected. As the lower court observed, quoting from this Court's opinion in *Atchison T. & S.F. R. Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 818 (1973)—and as no party now denies—the *only* consequence of the lower court's holding the Commission's orders invalid is that the Railroads would not be able to rely, in certain hypothetical "subsequent proceedings," on "a [C]ommission finding that the proposed rates were just and reasonable." 371 F. Supp. at 1308, n. 50. The Railroads do not claim to have suffered any pecuniary harm on this account. It does not even appear that any such "subsequent proceedings" have taken place in the year since the judgment appealed from.

In every practical respect, this order is a simple declaratory judgment. Its sole effect is to prevent the Railroads, in hypothetical "subsequent proceedings," from asserting a claim contrary to the judicial declaration—*i.e.*, a claim that the Commission properly found the rates in issue to be just and reasonable. The lower court's order does not determine whether the rates *are* just and reasonable. It does not interfere with the collection of any rate. Nor does it govern the outcome of any rate reparation proceeding that might be brought under § 13(1) of the Interstate Commerce Act, 49 U.S.C. § 13(1). It has not prevented the Commission from authorizing subsequent rate increases in subsequent general revenue proceedings.

The lower court's order thus lacks every one of the fundamental attributes of an injunction. No one has been enjoined. No part of the order is "enforceable by the power of contempt." *Gunn, supra*, 399 U.S. at 389. The order was not styled as an injunction by the lower court, nor is it characterized as such in appellants' jurisdictional statements or briefs. See, *e.g.*, Gov. Br. p. 12. It did not meet the requirements for an injunction as to form under Fed.R.Civ.P. 65(d). See *Gunn, supra*, at 388. It did not "paralyze . . . the operation of an entire regulatory scheme," or even any part thereof. *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 154 (1963). Rather, it affected the Commission's orders, and the Railroads' collection of rates, "in a totally noncoercive fashion." *Id.* at 155.

Appellees specifically invoked the Declaratory Judgment Act (28 U.S.C. § 2201-2202) in the lower court, and that court specifically characterized the relief sought and granted as "*a declaration* that the ICC has failed to comply with NEPA and that the orders approving the [rate] increases are thus void." 371 F.Supp. at 1295.[29] (Emphasis added.) Compare *Mendoza-Martinez, supra*, 372 U.S. at 153-54. It is well settled that a "declaration" is not an "injunction" for purposes of § 1253. In *Mitchell* v. *Donovan*, 398 U.S. 427, 430-31 (1970), this Court held that:

> "Section 1253 by its terms grants this Court jurisdiction only of appeals from orders granting or

[29] The Government concedes this characterization. (Gov. Br., p. 12.) While appellees went further, and also sought injunctive relief which was denied below, that fact is immaterial to the present jurisdictional issue. *Brashear, supra*, 306 U.S. at 206-07; *Gunn, supra*, 399 U.S. at 390, n. 5. And surely it cannot be argued that the lower court granted an injunction merely by "remand[ing the case] to the Commission for further proceedings consistent with the opinion in this case." (Gov. J.S., p. 2b.) See *Gunn, supra*, at 388-89; *Taylor* v. *Board of Education, Etc.*, 288 F.2d 600, 604 (2d Cir. 1961), *cert. den.* 368 U.S. 940 (1961).

> denying injunctions. While there are similarities between injunctions and declaratory judgments, there are also important differences. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 154-155; cf. Zwickler v. Koota, 389 U.S. 241, 254. The provisions concerning three-judge courts, including the provisions for direct appeal to this Court, antedate the Declaratory Judgment Act of 1934 [28 U.S.C. §§ 2201, 2202], but Congress substantially amended the three-judge court provisions in 1937 and 1948 without providing for such direct appeals from orders granting or denying declaratory judgments.
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> "We have stressed that the three-judge court legislation is not 'a measure of broad social policy to be construed with great liberality,' but is rather 'an enactment technical in the strict sense of the term and to be applied as such.' Phillips v. United States, 312 U.S. 246, 251. Thus this Court's jurisdiction under that legislation is to be literally construed. *It would hardly be faithful to such a construction to read the statutory term 'injunction' as meaning 'declaratory judgment.'*" (Emphasis added.)

This Court has adopted an undeviating "practice of strict construction of statutes authorizing [direct] appeals," *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, 42, n. 1 (1970). See also *Mitchell* v. *Donovan, supra; Gunn, supra; Rockefeller* v. *Catholic Medical Ctr.*, 397 U.S. 820 (1970); *Goldstein* v. *Cox*, 396 U.S. 471, 478 (1970); *Phillips* v. *United States*, 312 U.S. 246, 250 (1941). This principle was emphatically reaffirmed only this December, in *Gonzalez* v. *Automatic Employees Credit Union*, No. 73-858, 43 U.S.L.W. 4025 (U.S. Dec. 10, 1974).[30]

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[30] In *Gonzalez* the Court held that § 1253 is sometimes to be construed even more narrowly against direct appeals than its literal language might suggest. 43 U.S.L.W. at 4027-28, n. 14-16 and accompanying text. Here, of course, appellees ask only that § 1253 not be construed more broadly in favor of such appeals than its literal language requires.

Direct appeals from trial courts are highly disfavored for two distinct reasons. They deprive this Court of discretionary control of its docket, and they present for Supreme Court review matters not preliminarily passed on by any appellate court.

Appellants would have the Court disregard this "practice of strict construction," construe the lower court's "declaration" expansively as an "injunction," and reach out to review a complex record consisting of some 900 closely printed pages (A. 1-719; Gov.J.S. pp. 1a-1e)—essentially to determine whether the lower court erred in its factual findings as to a single environmental impact statement. (See pp. 45-63, *infra*.)

One could hardly imagine a more anomalous jurisdictional posture. According to the Report of the Study Group on the Caseload of the Supreme Court, 57 F.R.D. 573 at 597 (1972):

> "Since many ICC cases are not of sufficient importance to require review by the Supreme Court, it is clear that the unique treatment of ICC orders is a burden on the Supreme Court that can no longer be justified."

This may be the ultimate unimportant ICC case. It involves, at most, the burden of proof in proceedings which may never be held.[31]

Appellants argue that 28 U.S.C. § 1253 must be construed, in disregard of its actual language, in light of a peculiar history and a hidden social policy that allegedly underlay Chapter 157 of Title 28, U.S. Code (§§ 2321-25) prior to its amendment on January 2, 1975. Chapter 157 governs initial judicial review—not Supreme Court review—of the Commission's orders. But an examination

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[31] See Gov.Br., p. 5, n. 4.

of Chapter 157, as it stood prior to this January, shows that it will not support the non-literal and expansive meaning which appellants would give to the word "injunction" as it appears in 28 U.S.C. § 1253.

Pre-amendment [32] 28 U.S.C. § 2321 provided in relevant part that:

> "The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission . . . shall be as provided in this chapter.[33]

Section 2322 then provided that "[a]ll actions specified in section 2321" shall be prosecuted by or against the United States. Section 2323 provided that "in the actions specified in section 2321" the Government shall be represented by the Attorney General, and further delineated the roles of the Commission and other interested parties. Section 2324, *now repealed*,[34] granted district courts the power to issue preliminary restraining or suspension orders in actions "to enjoin, set aside, annul or suspend" a Commission order. Finally, § 2325, *now repealed*,[35] stated that:

> "An *interlocutory or permanent injunction* restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges. . . ." (Emphasis added.)

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[32] As used in this discussion, the term "pre-amendment" refers to the January 2, 1975 amendments. P.L. 93-584.

[33] Section 2321(a) now provides that such actions shall be brought "in the court of appeals." P.L. 93-584, § 5.

[34] P. L. 93-584, § 7.

[35] *Id.*

This statutory scheme was clear and unambiguous. Chapter 157, prior to the current amendments, governed actions to "enforce, suspend, enjoin, annul or set aside in whole or in part" orders of the Commission. 28 U.S.C. § 2321. However, only those actions that sought "[a]n interlocutory or permanent *injunction*" (emphasis added) were required to be heard by a three-judge district court. 28 U.S.C. § 2325.

Pre-amendment § 2321 was plainly broader than § 2325. It distributed power not only to enjoin, but also to "set aside in whole or in part" the Commission's orders.[36] Appellants slide over this difference, and argue that § 2325 is not to be read literally, but that the broader terminology of pre-amendment § 2321 should be substituted for the actual text of § 2325. Appellants then claim that § 2325—*as thus expansively and non-literally interpreted by appellants*—should be read into § 1253, which authorizes direct appeals only from the grant or denial of an "injunction," in any "civil action . . . required by any Act of Congress to be heard and determined by a district court of three judges." Thus, under appellants' reading, a suit asking *only* "a declaration" as to the validity of an ICC order for purposes of possible "subsequent proceedings" would be, *ipso facto*, a suit for an "injunction" within the meaning of § 2325, from which a direct appeal to this Court would lie under § 1253.

Appellants rely on a number of previous cases, dissimilar to the present one,[37] for the proposition that an action "to enforce, suspend, enjoin, annul or set aside

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[36] Section 2321 likewise distributed power to "enforce" Commission orders. But, under § 2325, a three-judge district court was not required in an action for such enforcement.

[37] Even assuming, *arguendo*, that some parallel could be constructed between these cases and this one, "it is also a fact that in the area of statutory three-judge court law the doctrine of *stare decisis* has historically been accorded considerably less than its usual weight." *Gonzalez, supra*, 43 U.S.L.W. at 4027.

in whole or in part" under pre-amendment § 2321 was invariably the same as an action for an "injunction" under § 2325. These are all cases in which the basic issue, directly involved, was the legality of action permitted or proscribed by the ICC. See, *e.g.*, *Chicago, M. & St. P. R.R. Co.* v. *United States*, 366 U.S. 745 (1961); *Ayrshire Collieries Corp.* v. *United States*, 331 U.S. 132 (1947).

Here, by contrast, the order appealed from determines only that the Commission failed to comply procedurally with NEPA in a general revenue proceeding. The lower court's order does not determine the legality or collectibility of any rate. It does not threaten the Railroads' revenue structure, determine reparation claims, or disrupt the Railroads' operations. The almost inconsequential practical effect of the lower court's order is reflected by appellants' leisurely prosecution of these appeals. The Government's brief was not filed until almost a year after the judgment appealed from.[38] Appellants do not claim to have suffered any practical injury or constraint during that year which requires the extraordinary procedure of immediate, direct review by the Supreme Court. To say that appellants have been subject to an "injunction" during that year is to stretch the word beyond recognition.

Nonetheless, according to appellants, the terms "set aside" and "enjoin"—terms used disjunctively in pre-amendment § 2321—must always and in all circumstances mean the same thing, regardless of the facts or practicalities of any particular case. Therefore, appellants

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[38] Appellants made no attempt to expedite these appeals; rather they waited until the next to the last day permitted by 28 U.S.C. § 2101(b) before filing their notices of appeal. Gov.J.S., p. 2c. They then sought and obtained multiple extensions of time for the filing of their jurisdictional statements and briefs. Nor did they otherwise behave as if an injunction were at issue. For example, no stay pending appeal was ever sought.

contend, an "injunction" is involved here, even though no one has been enjoined.

While the Railroads cite several commentators who have casually assumed that the terms "set aside" and "enjoin" had the same meaning,[39] none of these commentators had in mind NEPA litigation, or the type of relief granted here. The Railroads similarly claim that the Revisers' Notes accompanying the 1948 revision of the Urgent Deficiencies Act indicated no intent to limit the appealability of the Commission's orders. Yet again no evidence is offered that the Revisers had in mind cases such as this.

It is difficult to credit appellants' argument that § 2325, a *jurisdictional* statute, was nothing more than a loose, shorthand expression of Congressional intent which is not to be taken literally. The nub of the matter is that pre-amendment § 2321 described a class of lawsuits, while § 2325 described only a subset of that class. Had the drafters meant the two to be synonymous, they not only could have said so, but they *would* have said so—*precisely as they did in all other sections of Chapter 157 as it stood prior to January 2, 1975.* (§ 2322—"[a]ll actions specified in section 2321"; § 2323—"in the actions specified in section 2321"; § 2324—"enjoin, set aside, annul or suspend"). Further, while the authors of pre-amendment Chapter 157 were careful to adopt the language of pre-amendment § 2321 in the remainder of the chapter, they conspicuously *omitted* from § 2325 the following portion of its predecessor in the Urgent Deficiencies Act, 38 Stat. 220:

> ". . . and upon the final hearing of any suit brought *to suspend or set aside,* in whole or in part, any order of said commission the same requirement as

[39] R.R. Reply at p. 3-4.

to judges and the same procedure as to expedition and appeal shall apply." (Emphasis added.)

Finally, it must be recalled that appellants' claim that pre-amendment § 2321 was synonymous with § 2325 becomes relevant only if this Court first concludes that every order that was an "injunction" within the meaning of § 2325 is *ipso facto* an injunction within the meaning of § 1253. The established principle that § 1253 must be narrowly construed makes such a conclusion unsupportable.

While the distinction between suits to "set aside" Commission orders and those seeking an "injunction" was perhaps of no practical significance in the usual run of ICC cases tried before three-judge courts, that distinction is crucially important here. Because appellees sought an injunction initially, a three-judge court was properly convened. Had they requested only the relief ultimately granted, a single judge court would have been proper. Because the court below denied the requested injunction, appellees—but not appellants—might have appealed to this Court. *Brashear Freight Lines, supra.* That appeal would have drawn in question a refusal to grant an injunction. But appellants, who prevailed on that issue, are not properly before this Court under 28 U.S.C. § 1253.[40]

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[40] The Railroads assert, R.R.Reply at 10, n. 10, that this construction of § 2325 would lead to "[t]he strange consequence . . . that in an action to set aside an ICC order, *pendente lite* relief could be granted only by three judges but ultimate relief could be granted by a single judge." The Railroads are simply repeating the error of assuming that all ICC cases are the same. The true meaning of pre-amendment Chapter 157 was that if the *pendente lite* relief sought was a temporary injunction, then clearly § 2325 required a three-judge court and the losing party could appeal to this Court. But, if the only relief sought was relief of the sort actually granted below, then that request could be considered by a single judge. This is no anomaly but, in truth, simply a further implication of the distinction, embedded in the difference between

To recapitulate:

1. Section 1253 requires an appeal from the grant or denial of an "injunction."

2. No one argues that an injunction is at issue here, in any literal sense of that term.

3. Appellants argue that a kind of metaphorical injunction is at issue. To prevail in that argument appellants must prove *both* of the following propositions:

(a) That a judgment "set[ting] aside" an ICC order within the meaning of pre-amendment § 2321 must *always* be an "injunction" within the meaning of §2325; and

(b) That a judgment which is an "injunction" under § 2325 *solely* by virtue of proposition (a) must *always* be an "injunction" within the meaning of § 1253.

Appellants must prove that all of these concepts are *always* identical, because there is nothing that makes them identical here if they are not always so. On the contrary, the lower court and the Government have both characterized the relief appealed from here as a "declaration" (371 F.Supp. at 1295; Gov.Br., p. 12)—a type of judgment which this Court has repeatedly held not to be an "injunction" under § 1253. *E.g., Mitchell, supra; Mendoza-Martinez, supra.*

4. As a matter of ordinary English usage (to say nothing of the canon of strict construction applicable to statutes which authorize direct appeals) *neither* proposition (a) nor proposition (b) is supportable. In short, unless these appeals are permitted by some heretofore unannounced federal common law of Supreme Court jurisdiction over NEPA cases involving the ICC, these appeals will not lie because no "injunction" is at issue.

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§§ 2321 and 2325, between two substantively different forms of relief that have entirely different consequences.

II. THE COMMISSION'S GENERAL REVENUE PROCEEDINGS ARE NOT IMMUNE FROM JUDICIAL REVIEW TO DETERMINE COMPLIANCE WITH THE PROCEDURAL REQUIREMENTS OF NEPA.

The Railroads assert that the lower court lacked jurisdiction in this case, because the Commission's general revenue proceedings are not subject to judicial review. (R.R.Br., pp. 21-34). The Railroads' argument is that a party who seeks specific enforcement of the Commission's duty to prepare a single impact statement in a single general revenue proceeding, which covers "literally thousands of individual rates" (R.R.J.S., p. 31), must first seek separate impact statements, rate-by-rate, in administrative reparation proceedings under 49 U.S.C. § 13(1), before he can assert any claim in court.[41]

Not surprisingly, the Commission—which would have the burden of preparing this plethora of individual impact statements, and conducting these § 13(1) proceedings —has not endorsed the Railroads' contention. In fact the Commission says, in the impact statement at issue here, that:

> "It probably would not be possible for us to issue separate environment[al] impact statements for each specific commodity which has been classified as re-

[41] As the lower court stated:

> "It is suggested [by the Railroads] that an environmental group, while it could not obtain reparations [in a § 13(1) proceeding], should be able to complain that a particular charge on a particular item is unreasonable because of its environmental effects. Thus if SCRAP could initiate an investigation on this theory, it could argue further that before rejecting the complaint the Commission would have to prepare and consider an environmental impact statement [on the individual rate challenged, not on the cumulative effects of the general revenue order]. But we know of no Commission order or judicial opinion accepting this theory and it is thus too speculative and too unrealistic to support a denial of jurisdiction." 371 F.Supp. at 1297.

cyclable in this [general revenue] proceeding." (A. 21).

In two recent cases before this Court which did not involve NEPA, *Atlantic City Elec. Co.* v. *United States* and *Alabama Power Co.* v. *United States*, 400 U.S. 73 (1970), the Commission, on the basis of a careful analysis, squarely opposed the Railroads' contention that the Commission's general revenue proceedings are immune from direct judicial review.[42] The Court split evenly on that issue in those two cases.

The Commission's dispute with the Railroads in *Atlantic City* and *Alabama Power* is discussed in detail in the brief of appellee Institute of Scrap Iron and Steel ("ISIS"). SCRAP and EDF, *et al.* adopt the ISIS argument on this issue, and point out in addition that not only would the preparation of individual impact statements on a rate-by-rate basis be administratively burdensome, but also the net result would not be the practical equivalent of a single impact statement on a general revenue proceeding. As the court below correctly noted, an adequate analysis of the cumulative environmental effects of a general revenue order—which is the specific relief sought and ordered below—involves "far different questions," 371 F.Supp. at 1298, from those that can be raised in § 13(1) proceedings, which are available only in individual instances where a carrier (*not* the Commission) is alleged to have violated the Interstate Commerce Act (*not* NEPA).[43]

Thus the effect of the Railroads' proposed rule would not be merely to postpone judicial review of the Commission's compliance with NEPA in its general revenue proceedings, while relief *on that issue* was sought from the

[42] See Brief for Appellees United States, *et al.*, Nos. 70-78 and 70-106, at 15-41.

[43] *Compare* pp. 59-60, *infra*.

Commission. The effect of the Railroads' rule would be to foreclose review of that issue altogether, in contradiction of the Court's holdings on reviewability in cases such as *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410 (1971); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967); *Rusk* v. *Cort*, 369 U.S. 367, 379-80 (1962); *Brownell* v. *We Shung*, 352 U.S. 180, 185 (1956); and *Marcello* v. *Bonds*, 349 U.S. 302, 310 (1955). Judicial review would be restricted to the "far different questions" which could be raised under § 13(1).

This foreclosure of review would preclude environmental groups such as SCRAP and EDF, *et al.* from litigating the issue which has practical consequences for them, their members and the environment, namely the asserted *cumulative* environmental impact of a percentage rate increase which includes rates on recyclables.

III. THE DISTRICT COURT CORRECTLY FOUND THE COMMISSION'S IMPACT STATEMENT INADEQUATE.

A. The District Court Applied the Correct Legal Standard in Reviewing the Contents, as well as the Mere Form, of the Impact Statement.

The Railroads argue that the lower court erred by reviewing the contents, as well as the mere form, of the Commission's impact statement. (R.R.Br., pp. 34-39; R.R.J.S., pp. 22-28). On this issue as well they apparently part company with the Government.

Under the Railroads' reading of NEPA, an agency which drafts an impact statement would be its own final judge of whether that statement adequately and accurately sets forth—as it must—such information as the "alternatives to the proposed action," NEPA, § 102(2)

(C)(iii), 42 U.S.C. § 4332(2)(C)(iii); *Natural Resources Defense Council* v. *Morton*, 458 F.2d 827 (D.C. Cir. 1972), and the "full range of responsible opinion on the [proposed action's] environmental effects," *Committee for Nuclear Responsibility* v. *Seaborg*, 463 F.2d 783, 787 (D.C. Cir. 1971). On the Railroads' reading of the Act, the reviewing court's task would be complete once it ascertained that the agency had prepared a document labeled an "impact statement" which met "the prescriptions of NEPA as to form" (R.R.J.S., p. 22), and ascertained that this document had been circulated for comment according to the procedural requirements of § 102(2)(C) (R.R.Br., pp. 38-39; *cf. id.*, p. 50). The only circumstance in which the Railroads admit that an impact statement could be held invalid because of the inadequacy of its contents is where the statement is "perfunctory, feigned, or pro forma" (R.R.Br., p. 37), so as to be clearly "arbitrary, capricious [or] an abuse of discretion" within the meaning of 5 U.S.C. § 706(2)(A).

The Railroads thus contend for a standard of review which has been recently and unanimously rejected by all thirteen judges of the Ninth Circuit, sitting *en banc*. In *Lathan* v. *Brinegar*, Nos. 72-2932 and 72-2974, —— F.2d ——, 7 ERC 1048, 1057-58 (9th Cir., filed Sept. 27, 1974) that court held that review of an impact statement's contents lies under 5 U.S.C. § 706(2)(D), rather than under § 706(2)(A), and that an impact statement deficient in its contents requires the court, under subsection (2)(D), to "hold unlawful or set aside agency actions, findings and conclusions found [on that account] to be . . . without observance of procedure required by law." The Ninth Circuit concluded that review of impact statements under this comparatively broader standard will better serve the purposes of NEPA "than if [the courts] confine themselves with the straight jacket of § 706(2)(A)," and that

the judiciary "can, and should, require full, fair, bona fide compliance with NEPA." *Id.* at 1058.[44]

The Railroads' argument on this issue consists of a play on the words "substantive" and "procedural." In several cases, including *Lathan*, there has been language to the effect that judicial review of "substantive" agency decisions is limited under NEPA, and that once an agency has produced an adequate impact statement, the reviewing court should be reluctant to overturn the agency's decision to proceed with its proposed substantive action, whether that action consists of building a dam or a highway, or, as here, of approving rail freight increases. A sampling of such cases is set forth in the margin.[45]

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[44] In *National Helium Corp.* v. *Morton*, 486 F.2d 995 (10th Cir. 1973), *cert. den.*, 416 U.S. 993 (1974), the Tenth Circuit—like the unanimous Ninth Circuit in *Lathan*—rejected the proposition that review of an impact statement is limited by the " 'arbitrary and capricious' standard of § 706 of the APA," 486 F.2d at 1001. The Tenth Circuit explained that:

> "In assessing the adequacy of the impact statement, we are not here reviewing . . . agency action within the meaning of § 706 of the APA. Rather, we are concerned with the NEPA requirement which is, to be sure, a prerequisite for agency action but is not agency action itself. The trial court's conclusion that it was required . . . to apply the arbitrary and capricious standard was, in our view, erroneous." *Id.*

In so holding, the Tenth Circuit expressly followed Judge Wright's opinion in *Scientists' Institute for Public Information* v. *Atomic Energy Comm'n*, 481 F.2d 1079 (D.C. Cir. 1973) which the Tenth Circuit said "expounds the standards more clearly than earlier decisions." 486 F.2d at 1002.

[45] *See, e.g., Lathan, supra*, 7 ERC at 1057-58; *Environmental Defense Fund* v. *Armstrong*, 487 F.2d 814, 822, n. 13 (9th Cir. 1973); *National Helium Corp.* v. *Morton*, 486 F.2d 995, 1001-05 (10th Cir. 1973), *cert. den.* 416 U.S. 993 (1974); *Scientists' Institute for Public Information* v. *Atomic Energy Comm'n*, 481 F.2d 1079, 1082, n. 1 (D.C. Cir. 1973); *Jicarilla Apache Tribe of Indians* v. *Morton*, 471 F.2d 1275, 1279-80 (9th Cir. 1973). *But see, Environmental Defense Fund* v. *Corps of Engineers*, 492 F.2d 1123, 1138-41 (5th Cir. 1974); *Sierra Club* v. *Froehlke*, 486 F.2d 946, 952 (7th Cir. 1973); *Conservation Council* v. *Froehlke*, 473 F.2d

The Railroads' contention is that an agency's decision whether (or how thoroughly) to analyze a particular "environmental impact" or "alternative to the proposed action" in an impact statement is likewise "substantive," in the sense that it affects the "substance" of the impact statement, and that the courts must therefore defer to such decisions.

It is utterly plain, though, that an agency's decision on what to include in an impact statement is *not* "substantive" in the sense of the cases just cited, and that the courts are not, as the Railroads would have it, powerless to determine independently whether the contents of the impact statement are adequate. Indeed *Lathan* specifically holds that this kind of decision is "procedural," 7 ERC at 1058, and subject to thorough judicial scrutiny on review.[46]

In *Silva* v. *Lynn*, 482 F.2d 1282 (1st Cir. 1973), a case cited approvingly in *Lathan*, 7 ERC at 1058, the First Circuit made clear that the adequacy of an impact statement is something the reviewing court must determine for itself, taking into account the facts and circumstances of the particular case, including the full administrative record developed by the agency.

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664 (4th Cir. 1973); *Cape Henry Bird Club.* v. *Laird*, 359 F.Supp. 404, 410-11 (W.D. Va. 1973) *aff'd per curiam* 484 F.2d 453 (4th Cir. 1973), *Environmental Defense Fund* v. *Froehlke*, 473 F.2d 346, 352-55 (8th Cir. 1972); *Environmental Defense Fund* v. *Corps of Engineers*, 470 F.2d 289, 297-301 (8th Cir. 1972), *cert. den.* 412 U.S. 931 (1973); *Calvert Cliffs' Coord. Comm.* v. *Atomic Energy Comm'n*, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

[46] A genuine issue as to "substantive" review would be presented if the lower court had sustained the impact statement but nonetheless enjoined collection of the increased rates on the ground that they violated the substantive policies announced in § 101 of NEPA, 42 U.S.C. § 4331. But in fact the lower court did exactly the opposite. It found the impact statement inadequate, but left the rates in effect.

The First Circuit explained, *id.* at 1284, that:

> "[E]ven assuming that the final EIS [environmental impact statement] might seem fully adequate standing alone, uncertainty must attend a court's approval of a statement [where the court is unfamiliar with the] 'record of expert views and opinions the technological data and other relevant material . . . on which the agency acted' . . . , Appalachian Power Co. v. E.P.A., 477 F.2d 495, 507 (4th Cir. 1973)."

The First Circuit held that "the adequacy of the EIS" depends on such matters as whether the agency has adequately explored "alternatives to recommended courses of action," included "enough scientific reasoning to alert specialists to particular problems within the field of their expertise," and " 'afford[ed] a basis for a comparison of the problems involved with the proposed project and the difficulties involved in the alternatives.' " [47] 482 F.2d at 1284-85. In language highly apposite to the present case, the First Circuit also held, *id.* at 1285, that:

> "[W]here comments from responsible experts or sister agencies disclose new or conflicting data or opinions that cause concern that the agency may not have fully evaluated the project and its alternatives, these comments may not simply be ignored. There must be good faith, reasoned analysis in response."

The First Circuit concluded that the impact statement at issue in *Silva* fell "far short of what is required," *id.* at 1285, a conclusion which the court clearly based on independent scrutiny of the impact statement and the other evidence before it. For example, the court found that drainage problems attendant on proposed construction had been insufficiently analyzed, and that the agency had failed to meet the criticisms of other agencies, which,

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[47] *Quoting Monroe County Conservation Council* v. *Volpe*, 472 F.2d 693, 697 (2d Cir. 1972).

as here, had found the draft statement "inadequate." *Id.* at 1285-86.

The standard of review employed in other circuits is similar. Thus in *Environmental Defense Fund* v. *Corps of Engineers*, 348 F.Supp. 916 (N.D.Miss. 1972), *aff'd* 492 F.2d 1123 (5th Cir. 1974), the district court noted that:

> "The substantial grounds of plaintiffs' challenge to the adequacy of the EIS [on a proposed waterway] relate to the areas of (1) fauna, (2) water quality, (3) geology, (4) history and archaeology, and (5) other detrimental effects upon riverine ecology. The court, therefore, must examine each of these areas in the light of the remarkable diversity of opinion expressed by experts tendered by both sides, bearing in mind that the burden of persuasion rests upon plaintiffs." 348 F.Supp. at 933. (Emphasis added).

The district court then proceeded to make such an independent examination, as a result of which it found the impact statement to be adequate. *Id.* at 934-40. The Fifth Circuit affirmed, holding that:

> "The record demonstrates no mistake of law and no clear error of fact in the district court's holding. . . ." 492 F.2d at 1127.

In *Environmental Defense Fund* v. *Froehlke*, 473 F.2d 346 (8th Cir. 1972), the Eighth Circuit *reversed* a district court's finding that an impact statement was adequate. The grounds relied upon for reversal were as follows:

> "The final impact statement [on a channelization project] . . . is not sufficiently detailed to meet the standards of the Act [NEPA]. It is too vague, too general and too conclusionary. Thus it cannot form a basis for responsible evaluation and criticism. * * *

"The most significant failure of the . . . impact statement is its unsatisfactory discussion of alternatives to [the proposed action]. * * *

"In this case, a number of alternatives to the proposed project have been suggested by responsible critics, including state and federal agencies and private groups and individuals. * * *

"While some of these alternatives were mentioned in the impact statement and others set forth by including letters received by [sic] those who had suggested them, none were discussed in detail by the Corps.

"This treatment of alternatives is insufficient. * * *

"The Corps . . . argues that it was not necessary to discuss in greater detail the alternative of acquiring land to mitigate the loss of natural resources. . . . We disagree. * * *

". . . [W]e see no practical reason why the Corps could not have included in its final impact statement a thorough exploration of the possibility of mitigation. . . . * * *

"While the . . . impact statement fails to meet the standard of detail required by NEPA in other respects besides the discussion of alternatives, we think it unnecessary to discuss these at the present time." 473 F.2d at 348-52, *passim.*

The Railroads, curiously, rely on *Froehlke* for the proposition that "the courts . . . have recognized that judicial review of impact statements is quite limited." (R.R.Br., p. 36) But whatever the phrase "quite limited" may mean, it is clear that review in *Froehlke* was no more limited than review here. The court in *Froehlke* did exactly what the lower court did in this case. It reviewed the contents of a challenged impact statement, measured them against an evidentiary record, and found

those contents inadequate for lack of certain specified studies, and for failure to respond adequately to the comments of other agencies and members of the public.

Similarly, in *Monroe County Conservation Council* v. *Volpe, supra,* 472 F.2d at 693, the Second Circuit found that an impact statement was inadequate where, in the court's judgment:

> "The statement [made] passing mention of possible alternatives to the proposed action . . . , but it [did] so in such a conclusory and uninformative manner that it afford[ed] no basis for a comparison of the problems involved with the proposed project and the difficulties involved in the alternatives. *Id.* at 697.

Other courts as well have recognized and discharged their responsibility to give meaningful independent review to the contents, as well as the mere form, of challenged impact statements.[48] Indeed, only last September one of

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[48] *See, e.g., Natural Resources Defense Council* v. *Tennessee Valley Auth.,* 502 F.2d 852 (6th Cir. 1974); *Natural Resources Defense Council* v. *Morton,* 458 F.2d 827 (D.C. Cir. 1972); *Ely* v. *Velde,* 451 F.2d 1130, 1138-39 (4th Cir. 1971); *Committee for Nuclear Responsibility* v. *Seaborg,* 463 F.2d 783, 787 (D.C. Cir. 1971); *Warm Springs Dam Task Force* v. *Gribble,* 378 F.Supp. 240 (N.D.Cal. 1974), *stay granted,* 417 U.S. 1301 (1974) (Douglas, J.); *Nelson* v. *Butz,* 377 F.Supp. 819, 821-23 (D.Minn. 1974); *Natural Resources Defense Council* v. *Stamm,* 6 ERC 1525 (E.D.Cal. 1974); *I-291 Why? Ass'n* v. *Burns,* 372 F.Supp. 223, 243-62 (D.Conn. 1974); *Canal Auth. of Florida* v. *Callaway,* 6 ERC 1808 (M.D.Fla. 1974), *remanded with instructions,* 489 F.2d 567 (5th Cir. 1974); *Movement Against Destruction* v. *Volpe,* 361 F.Supp. 1360, 1388-89 (D.Md. 1973), *aff'd,* 500 F.2d 29 (4th Cir. 1974); *Montgomery* v. *Ellis,* 364 F.Supp. 517, 521 (N.D.Ala. 1973); *Natural Resources Defense Council* v. *Grant,* 355 F.Supp. 280, 286 (E.D.N.C. 1973); *Farwell* v. *Brinegar,* 5 ERC 1939 (W.D.Wis. 1973); *Ohio ex rel. Brown* v. *Callaway,* 364 F.Supp. 296 (S.D.Ohio 1973), *aff'd in part, rev'd in part and remanded,* 497 F.2d 1235 (6th Cir. 1974); *Daly* v. *Volpe,* 350 F.Supp. 252, 258-59 (W.D.Wash. 1972); *Brooks* v. *Volpe,* 350 F.Supp. 269, 275-80 (W.D.Wash. 1972), *aff'd,* 487 F.2d 1344 (9th Cir. 1973); *Environmental Defense Fund* v. *Tennessee Valley Auth.,* 339 F.Supp. 806, 809 (E.D.Tenn. 1972), *aff'd,* 468 F.2d 1164 (6th Cir. 1972), *application for stay denied*

the appellant Railroads succeeded in having an impact statement held invalid on the ground that its contents were inadequate. *Atchison, T. & S.F. Ry.* v. *Callaway*, 382 F.Supp. 610 (D.D.C. 1974); cf. *Chemical Leaman Tank Lines, Inc.* v. *United States*, 368 F.Supp. 925, 946-49 (D. Del. 1973) (three-judge court).

Appellants have cited *no* case—and SCRAP and EDF, *et al.* know of none—in which a court has sustained the rule the Railroads propose here, *i.e.*, that once an agency has merely met "the prescriptions of NEPA as to form" (R.R.J.S., p. 22), the contents of its impact statement then lie beyond judicial review.[49]

The Railroads thus ask that this Court overturn a sound, well-settled body of case law and establish a wholly new and radically restricted standard for judicial review of impact statements. The effect of this departure would be to give unreviewable discretion in the preparation of impact statements to an agency, the Commission, which has already gone to extraordinary lengths to defeat both the letter and the spirit of NEPA. *See, e.g., Harlem Valley Transp. Ass'n* v. *Stafford*, 500 F.2d 328, 331-32 (2d Cir. 1974); *SCRAP* v. *United States*, 371 F.Supp.

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414 U.S. 1036 (1973); *Akers* v. *Resor*, 339 F.Supp. 1375 (W.D. Tenn. 1972); *Environmental Defense Fund* v. *Corps of Engineers*, 325 F.Supp. 749, 759 (E.D.Ark. 1971), 342 F.Supp. 1211 (E.D. Ark. 1972), *aff'd*, 470 F.2d 289 (8th Cir. 1972). *Cf. Smith* v. *City of Cookeville*, 381 F.Supp. 100, 111 (M.D.Tenn. 1974).

[49] Besides arguing that a court may not hold an impact statement invalid on the basis of its contents, the Railroads also contend that merely by specifying the deficiencies in the present impact statement, the lower court injected itself impermissibly into the Commission's procedures on remand (R.R.Br., pp. 48-50). But this, of course, is nothing more than another way of arguing the same contention, *i.e.*, that all impact statements are valid merely by the fact of their existence. If a court were forbidden to specify *how* and *why* an impact statement was defective, it would be effectively forbidden to find that the statement *was* defective, since, as the Railroads also assert, "the agency's determinations cannot be rejected at large and in the abstract." (R.R.Br., p. 44).

1291, 1302 (D.D.C. 1974); *Chemical Leaman Tank Lines, supra*, 368 F.Supp. at 946-49; *SCRAP* v. *United States*, 346 F.Supp. 189, 194-95, n. 8, 200, n. 16, 201, n. 17 (D.D.C. 1972); *City of New York* v. *United States*, 337 F.Supp. 150, 158 (E.D.N.Y. 1972). The rule sought by the Railroads would also give unreviewable discretion to agencies which are institutional proponents of projects such as dams, highways, airports or nuclear reactors to determine whether environmental impacts of, and alternatives to, such projects have been adequately considered. Those agencies would be permitted—and the courts would be *required*—to turn a deaf ear to other federal agencies or responsible experts that protested, as here, that the environmental consideration had been inadequate.

Not only is the Railroads' proposed rule unsupported by the present body of case law under NEPA; it is also unsupported by this Court's other rulings on judicial review of agency action. For example, in *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971), this Court held that even where the court's power to overturn the agency's *substantive* action was narrowly limited under 5 U.S.C. § 706(2)(A), *id.* at 416,[50] the reviewing court was nonetheless required to examine "the full administrative record" on which the agency's action was based, *id.* at 420, so that the court could determine *inter alia*, whether the agency, before acting, had taken account of "the relevant factors." *Id.* at 416.

Similarly, in *Atchison, T. & S.F. Ry.* v. *Wichita Board of Trade*, 412 U.S. 800 (1973), this Court held that

[50] The agency's substantive action in *Overton Park* was a finding pursuant to § 4(f) of the Department of Transportation Act, 49 U.S.C. § 1653(f); 23 U.S.C. § 138, whose direct effect was to allow construction of a federally funded highway through a public park. See *National Helium*, note 44, *supra*, 486 F.2d at 1001, as to the distinction, for purposes of judicial review, between this kind of substantive action, and the preparation of an impact statement.

even where the reviewing court could not enjoin implementation of charges approved by the Interstate Commerce Commission, the court still had a

> "duty . . . to determine whether the course followed by the Commission is consistent with its mandate from Congress. . . . [A] simple examination of the order being reviewed is frequently insufficient to reveal the policies the Commission is pursuing. Thus this Court has relied on the 'simple but fundamental rule of administrative law' . . . that the agency must set forth clearly the grounds on which it acted." *Id.* at 806-07. (Citations omitted.)

Neither *Overton Park* nor *Wichita* contains the slightest hint that the agency's own assertions are dispositive as to whether a factor it failed to consider is "relevant," 401 U.S. at 416, or as to whether it has clearly stated "the grounds on which it acted," 412 U.S. at 807. Rather, *Overton Park* teaches that on such matters the agency is "not to [be] shield[ed] . . . from a thorough, probing, in-depth [judicial] review." 401 U.S. at 415.[51]

It would be highly anomalous if all aspects of an agency's decisionmaking process, and its explication thereof, were subject to such "thorough . . . review"—except those aspects that were reflected in a document labeled an "impact statement," as to which latter aspects the agency, not the court, had the final word. *See, e.g., Silva* v. *Lynn, supra,* 482 F.2d at 1283-84; *Ely* v. *Velde, supra,* 451 F.2d at 1138-39. Yet this is precisely the rule for which the Railroads contend.

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[51] *See also, Nat'l Labor Rel. Board* v. *Metropolitan Life Ins. Co.,* 380 U.S. 438, 442-44 (1965); *Natural Resources Defense Council* v. *Environmental Protection Agency,* 494 F.2d 519, 526-27 (2d Cir. 1974); *Essex Chemical Corp.* v. *Ruckelshaus,* 486 F.2d 427, 432 (D.C.Cir. 1973), *cert. den.* —— U.S. —— (1974); *Portland Cement Ass'n* v. *Ruckelshaus,* 486 F.2d 375, 393-4 (D.C.Cir. 1973), *cert. den.,* 417 U.S. 921 (1974).

B. The Lower Court Properly Applied the "Rule of Reason" in Reviewing the Commission's Impact Statement.

The Commission accurately points out that "the federal courts . . . have applied a rule of reason when ascertaining whether a federal agency has complied with the requirements of Section 102 [of NEPA]." (Gov.Br., p. 20).

No showing is made, though, that the lower court ignored this rule of reason. In fact, the author of the lower court's opinion, Judge Wright, is one of the principal proponents of the rule. Writing for the District of Columbia Circuit in *Scientists' Institute for Public Information* v. *Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973), he observed that:

> ". . . Section 102[2](C)'s requirement that the agency describe the anticipated environmental effects of proposed action is subject to a rule of reason. The agency need not foresee the unforseeable . . . .
>
> " 'The statute [NEPA] must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible * * *' [52] But implicit in this rule of reason is the overriding statutory duty of compliance with impact statement procedures to 'the fullest extent possible.' " [53]

Rather than abandoning the rule of reason here, the lower court found the Commission's impact statement inadequate in light of that rule. Unlike the Railroads' proposed rule, the rule of reason does not require that every impact statement be found adequate. Nor does the rule of reason limit the reviewing court to determining only

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[52] *Citing Natural Resources Defense Council* v. *Morton*, 458 F.2d 827, 837 (D.C.Cir. 1972).

[53] *Citing Calvert Cliffs' Coord. Comm.* v. *Atomic Energy Comm'n*, 449 F.2d 1109, 1114-15 (D.C.Cir. 1971). (*See also National Helium, supra*, 486 F.2d at 1001-02, holding that "rule of reason" requires compliance to "fullest extent possible.")

whether the defects in an impact statement are so egregious as to be "arbitrary, capricious, [or] an abuse of discretion" within the meaning of 5 U.S.C. § 706(2)(A). In fact, the very essence of this rule is that it does *not* so limit the court. *National Helium, supra,* 486 F.2d at 1002, n. 5; *see Lathan, supra,* 7 ERC at 1058.

One fundamental requirement which the courts have consistently enforced under the rule of reason is that impact statements must set forth sufficient data on environmental effects of proposed action to "form a basis for responsible evaluation and criticism," *Environmental Defense Fund* v. *Froehlke, supra,* 473 F.2d at 348. NEPA is not satisfied by impact statements which are "conclusory and uninformative," *Monroe County, supra,* 472 F.2d at 697; or which fail to "explicate fully [the agency's] course of inquiry, its analysis and its reasoning," *Ely* v. *Velde, supra,* 451 F.2d at 1139; or which do not "contain enough scientific reasoning to alert specialists to particular problems within the field of their expertise," *Silva* v. *Lynn, supra,* 482 F.2d at 1285.

C. Under Fed.R.Civ.P. 52(a), the District Court's Findings as to the Inadequacy of the Impact Statement Should Not Be Set Aside Unless a Review of "the Entire Evidence" Shows Those Findings to Be "Clearly Erroneous."

As the cases discussed at pp. 34-42, *supra,* make plain, the adequacy or inadequacy of an environmental impact statement is not a legal question that can be decided *in vacuo.* Rather it is a predominantly factual question, which depends on the specific circumstances of each case, and which cannot be decided except on an adequate evidentiary record.

In the present case, the adequacy or inadequacy of the impact statement is largely a question of economics, *i.e.,*

whether the statement adequately analyzes the economic relationships through which the rail rate structure influences the natural environment, and adequately analyzes alternatives to the rate increase in issue. On the basis of a record which included submissions from five federal agencies and various independent experts, the lower court found that the Commission's impact statement contained no analysis sufficient to support its conclusions, and found, further, that the Commission had not responded adequately, or, indeed, at all, to criticisms advanced by these other agencies or by the independent experts.

These are findings which are entitled to some deference on review. Rule 52(a) of the Federal Rules of Civil Procedure provides that a district court's "[f]indings of fact shall not be set aside unless clearly erroneous . . . ."

This "clearly erroneous" test applies specifically to findings as to the adequacy of scientific, technical or factual analysis in an impact statement. *Environmental Defense Fund* v. *Corps of Engineers*, *supra*, 492 F.2d at 1127, 1137; *cf. National Helium*, *supra*, 486 F.2d at 1002, n. 5.[54] It applies not only to findings based on oral testimony, but also to "inferences drawn from documents," *United States* v. *U. S. Gypsum Co.*, 333 U.S. 364, 394 (1948), and to factual findings which determine a legal question if, as here, the question turns on a "multiplicity of relevant factual elements, with their various combinations, creating the necessity of ascribing the proper force to each." *Commissioner* v. *Duberstein*, 363 U.S. 278, 289

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[54] See also p. 14 of the Solicitor General's "Memorandum for the Respondents in Opposition [to Stay]," filed in *Warm Springs Dam Task Force* v. *Gribble*, No. A-1146 (June, 1974) ("clearly erroneous" test assertedly applicable to district court's finding that "all the potential hazards are adequately discussed and were adequately studied" in impact statement on proposed dam); *compare* 417 U.S. 1301 (1974) (Douglas, J., granting stay). *Cf.* Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn.L.Rev., 751, 780 (1957).

(1960); see also *McAllister* v. *United States*, 348 U.S. 19, *modification den.*, 348 U.S. 957 (1954).

Moreover, Rule 52(a) applies with special force where a challenged finding involves a choice among expert opinions on technical issues, such as the questions of economic analysis involved in the present case. *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 274-75 (1949).

This Court has held that the "clearly erroneous" standard of Rule 52(a) precludes reversal of a trial court's factual findings except where "the reviewing court *on the entire evidence* is left with the definite and firm conviction that a mistake has been committed," *U. S. Gypsum, supra*, 333 U.S. at 395 (emphasis added). *See also Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969); *United States* v. *E. I. DuPont de Nemours & Co.*, 351 U.S. 377, 381 (1956); *McAllister, supra*, 348 U.S. at 20-23; *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 339 (1952).

The Railroads assert that:

> "We do not believe that this Court needs to reach and weigh each of the individual criticisms the lower court made of the impact statement . . . in order to hold that the impact statement met the requirements of NEPA." (R.R.Br., p. 38).

But the cases just cited make plain that the factual findings of a district court cannot be set aside except on a review of "the entire evidence." And, as a practical matter, it is difficult to see any basis *other* than "the entire evidence" on which an appellate court could overturn a district court's findings as to the adequacy of the factual, scientific and technical analysis in an impact statement. Certainly the appellate court must look be-

yond the mere length and form of the statement—unless prolixity and empty formalism as such will satisfy NEPA, a proposition for which there is no support in the existing cases. See pp. 34-45, *supra*.

This Court has traditionally been reluctant to attempt *de novo* review of a lower court's findings as to factual issues. *See, e.g., Zenith Radio, supra*, 395 U.S. at 123; *DuPont, supra*, 351 U.S. at 381; *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 596-97 (1951); *United States* v. *Yellow Cab Co.*, 338 U.S. 338 (1949). But in any event, there is no basis here for a "definite and firm conviction" [55]—or, indeed, any conclusion at all—that the lower court erred in finding (a) that certain studies are essential, as a matter of sound economics, to an analysis of how freight rates, and increases therein, affect the environment; (b) that the Commission did not in fact perform these essential economic studies; and (c) that the Commission failed to give an adequate response to the criticisms of the draft statement made by other agencies and members of the public.

D. The District Court's Findings of Inadequacy Were Amply Supported by the Record, and Should Be Sustained.

Four of the five federal agencies that commented on the Commission's impact statement [56] concluded that it contained insufficient information on the environmental impact of the proposed rate increases to afford a basis

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[55] *U. S. Gypsum, supra*, 333 U.S. at 395.

[56] "Prior to making" its impact statement, the Commission was required by statute to "consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved" in the proposed rate increase. NEPA, § 102(2)(C), 42 U.S.C. § 4332(2)(C).

for informed decisionmaking.[57] The fifth federal agency concluded that the statement contained insufficient analysis of alternatives to the proposed action.[58] The issue before this Court is whether the district court "clearly err[ed]" (Fed.R.Civ.P. 52(a)) in accepting the judgment of these five federal agencies, and in finding the impact statement inadequate.

1. *The Comments of Expert Federal Agencies, and the Commission's Failure to Respond*

The Department of Commerce concluded that the Commission's statement was inadequate because it simply gave:

> "the Commission's judgment on the issue [of environmental impact] without in-depth supporting documentation [, which] is insufficient. We suggest, accordingly that the final environmental impact statement give more attention to this issue and less to justifying a contemplated rate-making action[59] * * * "We believe the statement should contain a more rigorous economic analysis. . . ." (A. 579).

Similarly, the Department of the Interior commented that:

> "[*T*]*he environmental impacts expected are not analyzed.* Hence, instead of an impact appraisal, the

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[57] See A. 705-06 (Council on Environmental Quality); A. 707-16 (Environmental Protection Agency); A.702-04 (Department of the Interior); A. 576-79 (Department of Commerce).

[58] See A. 597-607 (General Services Administration). *Compare, e.g., Monroe County, supra,* 472 F.2d at 697-98; *Natural Resources Defense Council* v. *Morton, supra,* 458 F.2d at 835-36.

[59] See the *Christian Science Monitor,* Feb. 28, 1973, p. 12, quotting Rep. John Dingell, a principal sponsor of NEPA, as saying that some agencies "are complying poorly. They decide what they are going to do and then write an environmental impact statement to support the decision. That is not what Congress had in mind."

main thrust of the discussion is the justification of increased rail freight rates. * * *

"*In summary, no meaningful analysis of the impact statement is really yet possible because the environmental impact is not effectively considered.* A suggestion would be to completely restructure the content of the report by incorporating most of the present environmental impact section as the description of the proposed action. A new environmental impact section could then be developed which would actually examine the expected impacts. . . ." (A. 703-04). (Emphasis added.)

The Council on Environmental Quality commented in the same vein that:

"In our letter of October 30, 1972 [A. 556] we pointed out the deficiencies of the Commission's approach to the question of the impact of rate changes on scrap consumption. The deficiencies have not been corrected. For example, the Draft Environmental Impact Statement ignores completely the very important consideration of how freight rates might affect long-run decisions on investment in scrap-intensive facilities, such as electric arc furnaces." (A. 705).

The Environmental Protection Agency commented that:

"[T]he Commission's basic conclusion that the rate increases in question will have no effect on the use of secondary materials and therefore will have no environmental consequences is not adequately substantiated. The Commission's analysis of alternatives to the proposed increases is also judged inadequate. * * *

"The Commission, at the very minimum, should have substantiated the cost basis of the carriers' request for increased revenues from secondary materials. In addition, reasonable alternatives to the pro-

posed action should have been thoroughly analyzed." (A. 708, 712, *passim*).

The Environmental Protection Agency placed the Commission's impact statement in its lowest classification, "Category 3— Inadequate," meaning that:

> "EPA believes that the draft impact statement does not adequately assess the environmental impact of the proposed project or action, or that the statement inadequately analyzes reasonably available alternatives." (A. 715).

The General Services Administration complained that the Commission had failed to explore the alternatives of deregulating the rate structure for scrap, and thus introducing "an added element of competitive [downward] pressure on these rates." (A. 604). The GSA agreed with the Commission that it could not implement this alternative on its own authority, but pointed out that:

> ". . . the Commission does not lack authority to recommend to Congress that such an exemption be added to the statute. In view of the pendency of much broader deregulatory proposals in Congress, with a broad base of opinion behind them, it is not unlikely that such a recommendation by the Commission—which has been one of the leading forces opposing deregulatory proposals heretofore—would carry considerable weight." (A. 605).[60]

The Commission flatly refused to produce any of the further analysis requested by these sister agencies. Its response was limited to a querulous statement that "the governmental interests . . . seek to demonstrate that this Commission should investigate environmental matters and effects more extensively. . . . It is such one-dimensional approaches as these that we are knowingly seeking to avoid." (A. 18).

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[60] Compare *Natural Resources Defense Council* v. *Morton*, *supra*, 458 F.2d at 835.

Appellants now urge that the lower court clearly erred, on the basis of the entire record, in accepting the view of the Council on Environmental Quality, the Environmental Protection Agency, the Department of the Interior, and the Department of Commerce, not to mention various independent experts,[61] that the Commission's impact statement provided insufficient information for informed decision making. Appellants ask the Court to form a contrary opinion as to the amount of information needed, and to write that opinion into law.

Appellants ask the Court to give uncritical acceptance, for this purpose, to a Commission analysis which the commenting agencies found not only inadequate, but also self-contradictory. The Environmental Protection Agency, for example, pointed out that:

> "The Commission's decision to limit rate increases to 3 percent on all secondary materials except steel [62] was made in contrast to its conclusion that secondary materials 'would continue to move despite the proposed increases.' Yet, the Commission also reasoned that a 'hold down' on rate increases 'should encourage the movement and recycling of commodities.' *To simultaneously maintain that rate increases will not affect the movement of secondary materials and that 'hold-downs' will encourage movement and recycling is an ambivalent position, indicating that rate increases on secondary materials are arbitrary actions. . . .*" (A. 574). (Emphasis added.)

Appellants also ask the Court to accept, for this purpose, conclusions that even the Commission has since modified or abandoned. See pp. 10-13, *supra*.

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[61] *See, e.g.*, A. 633-652.

[62] *See* Gov.J.S., p. 60d.

Finally, appellants ask the Court to overturn or ignore the salutary rule that when sister agencies reject an impact statement as inadequate, the drafting agency must provide "good faith, reasoned analysis in response." *Silva* v. *Lynn, supra*, 482 F.2d at 1285.[63] In the present case the Commission merely summarized the comments received on its draft statement (A. 191-98), denounced the agencies and parties that submitted those comments (A. 18) and re-adopted almost verbatim, as a final impact statement, the same text that the other agencies had found inadequate when they reviewed it as a draft. (Compare A. 9-199 with A. 200-419.) This is the point of the lower court's observation—made much of by appellants—that:

> "Most of the recipients of the [draft] statement responded with extensive critical comments. * * * None of these comments, however, caused the Commission to alter even partially its conclusions or to change the statement's analysis in any noticeable way." 371 F.Supp. at 1302.

The problem is not that the Commission decided, after preparing and considering an adequate environmental impact statement, to authorize a rate increase. The Commission has discretion to do that. The problem is that the Commission would not take the steps needed to produce an adequate impact statement, even after other federal agencies with environmental expertise had determined

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[63] See *Lathan* v. *Volpe*, 350 F.Supp. 262, 265 (W.D. Wash. 1972): "The proper response to comments which are both relevant and reasonable is to either conduct the research necessary to provide satisfactory answers, or to refer to those places in the impact statement which provide them. *If the final impact statement fails substantially to do so, it will not meet the minimal statutory requirements.*" (Emphasis added.)

See also: *Citizens for Clean Air, Inc.* v. *Corps of Engineers*, 349 F.Supp. 696, 707 (S.D.N.Y. 1972); *Brooks* v. *Volpe*, 350 F.Supp. 269, 278 (W.D. Wash 1972); *cf. South Terminal Corp.* v. *Environmental Protection Agency*, 504 F.2d 646, 665 (1st Cir. 1974).

the Commission's draft statement to be inadequate. The Commission refused to produce "good faith, reasoned analysis in response." And the lower court properly so found.

2. *Failure to provide quantitative analysis*

A principal defect of the Commission's impact statement was its failure, in the words of the lower court, to provide "a quantitative . . . economic study . . . on the responsiveness of the demand for secondary materials to changes in transportation costs." 371 F.Supp. at 1302. (Emphasis added.)

The basis of the Commission's ultimate conclusion that the proposed rate increase would have no adverse environmental impact—despite the *positive* environmental impact which the Commission claimed for its holddown of rates on non-ferrous scrap [64]—was a series of essays on various recycling industries. In each of these essays the Commission described difficulties (other than the rate structure) which inhibit the use of a recyclable commodity, and listed various factors which "may" justify differential rates for the recyclable commodity and the competing virgin material. Each discussion ended with a conclusory assertion that the impact of the proposed freight rate increases would be "minimal," (A. 126, 131); that the rate increase would affect "only a fraction of the . . . market," (A. 116); that the increase would "not have a significant adverse effect upon the environment," (A. 97) or that "there is no evidence sufficient to prove the case for or against the proposed increase on environmental grounds." (A. 104). (*See also* A. 69-70, 135, 138.) No attempt was made to quantify the expected impact, to define "minimal" or "significant" for these purposes, or to present any basis for the conclusion except to recite other factors which also affect the use of recyclables.

[64] Gov.J.S., p. 60d.

A reader of the statement, who does not know whether his own definitions of "minimal" or "insignificant" parallel those of the Commission,[65] is at a total loss to draw any conclusions from the statement—except for the obvious one that the Commission decided that other factors outweighed the environmental considerations.

Analytically, the claim that an environmental impact is "insubstantial" must be grounded on two propositions: First, that any impact less than "x" is insubstantial; second, that the impact in this particular case is less than "x." But as long as the reader of the impact statement is not told the value of "x," or why the Commission concluded that the impact would be less than "x," the document is useless to him.

As the Environmental Protection Agency pointed out (A. 574), the reader's puzzlement is deepened by the Commission's discussion of its "holddown" for non-ferrous scrap. The Commission's simultaneous assertions (a) that the holddown would "encourage" movement of scrap (Gov. J.S., p. 60d), but (b) that the three percent rate increase reflected in the holddown would not "significantly" retard the movement of this scrap (A. 139), give the reader no clue as to what the Commission has concluded. To what extent is movement comparatively encouraged by an increase of 3 rather than 4.1 percent? To what extent is it comparatively discouraged by an increase of 3 percent rather than no increase at all? The reader is not told.

This point is not merely academic. The Commission has discretion to approve a rate increase on recyclables, even where thorough examination discloses environmental costs. But it does not have the authority to waive or shortcut this thorough examination.[66] Nor does the Commission

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[65] *See, e.g.*, pp. 11-12, n. 18, *supra*.

[66] See, *e.g.*, *Calvert Cliffs'*, *supra*, 449 F.2d at 1115.

always have the last word as to rail rates. That last word is reserved for the President and Congress, and, ultimately, for the electorate. Thus in *Natural Resources Defense Council* v. *Morton*, 458 F.2d 827, 835 (D.C.Cir. 1972), the court held that:

> "The impact statement is *not only for the exposition of the thinking of the agency, but also for the guidance of these ultimate decision-makers, and must provide them with the environmental effects of both the proposal and the alternatives*, for their consideration along with the various other elements of the public interest." (Emphasis added.)[67]

The degree of quantification needed to apprise "these ultimate decision-makers" of "the environmental effects of . . . the proposal" must obviously vary with the factual circumstances of each case. Here, other federal agencies with environmental expertise overwhelmingly demanded greater quantification and explanation from the Commission.

This is why the lower court found the impact statement inadequate for lack of any "price sensitivity studies." 371 F.Supp. at 1303. In so finding, the lower court did not seek to impose any particular methodology on the Commission—nor did any of the commenting agencies. The term "price sensitivity study" is not, as appellants suggest here, a rigid term of art. A price sensitivity study could employ any of a number of valid techniques. It requires only that the Commission attempt to quantify the relationship between rail rates (prices) and greater or lesser use of scrap.

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[67] *Accord, e.g.*: *Committee for Nuclear Responsibility, supra*, 463 F.2d at 787; *Environmental Defense Fund* v. *Corps of Engineers, supra*, 492 F.2d at 1136; *Calvert Cliffs', supra*, 449 F.2d at 1114.

a. *The impact statement in Ex Parte 295*

Such quantification is by no means impossible. After the order of the court below, the Commision demonstrated its capacity to produce such data. On November 5, 1974, the Commission filed its final impact statement in *Ex Parte 295*, a subsequent general revenue proceeding. This statement implicitly conceded the validity of many of the major criticisms of the Commission's impact statement in *Ex Parte 281*, admitting for example, that the Commission's sole gesture toward quantification in *Ex Parte 281*, an historical comparison of freight rates and scrap movements, was "unfair as well as imprecise" (p. 7-4),[68] and that quantification is needed in describing the environmental impact of rail rates, because:

> "Conclusion as to what is or is not significant is a judgment reflecting the standard of reference used. . . . (p. 3-3)
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> * * * *
>
> "It is recognized that the question of the significance of any given level of change is necessarily judgmental, reflecting a particular frame of reference and ultimately a standard of values. (p. 7-36)

The *Ex Parte 295* impact statement therefore included price sensitivity studies as to metal scrap and textile wastes, and reached *quantitative* conclusions as to the

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[68] See also the Environmental Protection Agency's criticism of this historical comparison:

> "The crux of the Commission's 'no impact' conclusion . . . was that the movement and use of secondary materials would not be curtailed by the rate increases. The main supporting evidence it presented was that, notwithstanding past increases in freight rates, secondary commodities have continued to move, in some cases in increasing volumes. The fallacy in this reasoning is that many factors other than freight rates affect the price and movement of these commodities; *one cannot look at the aggregate of all those variables and conclude that one of them apparently had no effect.*" (A. 573) (Emphasis added.)

impact of a general revenue increase upon the movement of those recyclables (pp. xiii-xv). It contained, as well, a point-by-point response to the comments of other federal agencies and interested parties (pp. 7-1—7-39), and admitted that the mere fact that other factors also affect the degree to which recyclables are used does not establish that an increase in freight rates has no effect (pp. 2-28).

The Commission, for reasons best known to itself, did not return to the lower court with an offer to apply the type of analysis used in *Ex Parte 295* to the issues in *Ex Parte 281*. It is difficult to contend, in light of *Ex Parte 295*, that the Commission was unable to satisfy the lower court's requirement for quantification in the context of a general revenue proceeding. *Ex Parte 295* was just such a general revenue proceeding. And it is *impossible* to contend, in light of *Ex Parte 295*, that the Commission has any reasoned policy against the use of "price sensitivity studies." In *Ex Parte 295*, the Commission came to tacit agreement with the lower court that such studies are not only appropriate, but, indeed, necessary.

3. *Failure to consider the underlying rate structure*

The lower court also found the Commission's impact statement inadequate on the ground that:

> "We fail to understand how any consideration of the environmental impact of approving the recyclable rate increases could be full without an analysis of how the underlying rate structure itself affects the environment. It is the underlying rate structure which the percentage increases aggravate; if this structure contributes to the degradation of our environment, then the increases would at least presumptively aggravate that contribution." 371 F. Supp. at 1304.

Not even the Commission contends that, as a matter of sound economic analysis, the environmental effects of the present revenue order can be determined without examining the environmental effects of the underlying rate structure. The Commission has acknowledged, in its impact statement in *Ex Parte 295*, that the long-term effect of a percentage rate increase is "to perpetuate and increase any inequities that may exist . . . between primary and secondary commodities," and that such an effect "applies particularly to waste paper and non-ferrous metals for which the . . . Commission has computed differentials in favor of primary materials." (pp. xv-xvi)[69]

The impact statement in *Ex Parte 295* also asserts that:

> "The broader question regarding what the impact of any future general rate increases may have in regard to investment decisions is part of the larger issue of whether or not freight rates are discriminatory." (p. 7-11)

Thus, the rate structure may influence ongoing decisions which will determine the structure of various industries for years to come. The Commission, moreover, admits here that it "is well aware of the need for a thorough study of the basic railroad freight structure. . . ." (Gov. J.S., p. 14). But the Commission does not claim that the present impact statement contains such a study. The Commission's only claim for this statement is that it "examined the evidence [of underlying discrimination] on a preliminary basis." (Gov.Br. p. 44).

This "preliminary" discussion consists principally of a long, elaborate demonstration that differences in per-ton-mile freight rates do not, as such, constitute illegal discrimination under the Interstate Commerce Act. This essay lists various factors which "may" (*see* A. 41,

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[69] *See also* pp. 7-18; 7-25.

42, 91, 113, 138, 144, 154) legally justify rate differentials.

This dissertation is essentially irrelevant to the actual questions which NEPA requires the Commission to address, namely, (a) the actual environmental impact of the proposed rate increases in view of the underlying structure, and (b) the impact and feasibility of "alternatives to the proposed action." It is a *non sequitur* to suggest, as the Commission does, that if an existing or proposed rate "may" be nondiscriminatory in a *legal* sense under the Interstate Commerce Act, it therefore has no *practical* impact, pro or con, on the shipment of recyclables. This section of the impact statement reveals that the Commission considers such a multiplicity of factors as relevant to ratemaking,[70] (factors which the Commission apparently does not subject to any formula for determining their precise impact on individual rates) that the Commission could, if it liked, justify any number of different rate structures as just and reasonable under the Interstate Commerce Act—different rate structures which could have markedly different environmental impacts.

The practical importance of analyzing the underlying rate structure in the context of a general revenue order is highlighted by statements which the Commission made in its *Ex Parte 295* impact statement. In that impact statement, the Commission considered the alternative of raising freight rates selectively for certain items which do not, under the existing structure, pay their own variable costs, so that their transportation must be subsidized by rates charged on other commodities.

The *Ex Parte 295* impact statement concluded that "for specified classes of commodities, deficit operations . . . can be estimated as totalling over $600 million; unclassified

[70] *See* A. 29.

freight rate shipments accounted for additional deficits exceeding $520 million," (pp. 6-2—6-3) and that:

> "Principal commodities resulting in deficit operations . . . [included] metallic ores . . . and forest products. . . . The last named category—primary wood materials—provided the largest deficit contributions. . . . It is significant that except for small amounts of scrap paper carried within the Northeast . . . *no secondary commodities were reported as transported under conditions such that variable costs exceeded revenue.* On the other hand, the deficits involved in transporting some ores . . . totaled about $13,000,000." (Emphasis added.)

The Commission's acknowledgment that the freight rates for many primary products do not even cover their variable costs makes analysis of the underlying rate structure essential to consideration of one of the principal alternatives available in a general revenue proceeding. In reply to the suggestion that rates for virgin materials be increased in relation to rates for recyclables, the *Ex Parte 295* impact statement concluded that this alternative raises an issue of:

> ". . . whether it is advisable to raise rates charged for one broad class of commodities which are now being carried above cost and whose movement should be encouraged on environmental grounds, rather than seeking an equivalent increase in revenue from selectively raising rates on commodities not now meeting variable costs." (p. 6-4)

The Commission then acknowledged that raising rates on primary products which do not meet their variable costs—instead of raising rates on recyclables—is a:

> ". . . *feasible alternative* and . . . is viewed as an inseparable part of the overall rate study regarding an equitable structure." (p. 7-38) (Emphasis added.)

Yet, in *Ex Parte 281*, the present proceeding, the Commission answered a similar suggestion, advanced by appellees Environmental Defense Fund, *et al.*, as follows:

> "Finally, EDF, *et al.*, request that we raise the rates on primary commodities because, it is asserted, the transportation charges for hauling primary commodities do not pay the variable costs of the railroads. In the first place, the rates on primary commodities have already been found to be just, reasonable, and lawful; and we, therefore, would have no lawful or statutory basis for raising such rates. Were we arbitrarily to require that such rates be increased without finding them not to be just, reasonable, and lawful—and the railroads were to lose traffic and become unprofitable as a result—then such action might be found to constitute an unconstitutional taking of property without due process of law.[71] Secondly, the Congress has established tax incentives to promote the discovery and utilization of certain primary commodities. For us to take action which would inhibit the movement of those commodities would be inconsistent with one of our national policies established by the Congress and would, therefore, be equally improper." (A. 156).

This gross inconsistency illustrates the consequences of ruling out any consideration of the underlying rate structure in *Ex Parte 281*. This limitation made it impossible to discuss an immediately available, highly important

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[71] This refrain—that if proposed rate increases are not unjust or unreasonable, the Commission has no power to influence them—echoes throughout the Commission's brief. The answer is supplied by the Commission's action *in this very proceeding*, in "holding down" the rate increase on non-ferrous scrap to 3 percent. In taking this action the Commission made no suggestion, much less a reasoned showing, that a "holddown" to anything other than 3 percent (*e.g.*, 2.5 percent or 3.5 percent) would have resulted in rates unlawful under the Interstate Commerce Act, or in "an unconstitutional taking of property without due process of law." See p. 60, *supra*.

alternative which the Commission later acknowledged as "feasible."

In this litigation, the Commission asks the Court to disregard the wisdom which the Commission acquired belatedly in *Ex Parte 295*, and allow the Commission (a) to close its eyes to data which admittedly show that the underlying structure discriminates in a practical sense, (b) to shut off debate on alternatives which it now confesses to be "feasible," and (c) to rely on methods of analysis which it has since described as "unfair as well as imprecise." Perfect consistency may be too much to demand from an administrative agency; but the self-contradiction achieved by the ICC in this instance has reached a level of comic-opera absurdity. Unfortunately, vital national interests—energy, raw materials, and the environment—are at stake here. Unfortunately, too, it has become clear that the relevant considerations will never be systematically addressed unless judicial pressure, which has already forced such progress as the Commission has made, can be maintained. In short, the ICC's refusal to analyze the environmental impact of the rate increases in *Ex Parte 281*, and the alternatives thereto, is a perfect illustration of the reasons which led Congress to enact NEPA in the first place, and of the reasons which require rigorous judicial enforcement of that Act.

a. *The impact statement in Ex Parte 270 (Sub-Nos. 5 and 6)*

On March 29, 1974, less than two months after the order of the lower court, the Commission published a draft impact statement in *Ex Parte 270*, Sub-Nos. 5 and 6. This impact statement, at least according to the Commision, contains a thorough and adequate study of the underlying rate structure for ferrous scrap, which the Commission characterizes here as "the principal commodity in issue." (Gov.J.S., p. 14). The draft statement was succeeded by a final impact statement, covering the

same subject matter, on June 28, 1974. Again, for reasons best known to itself, the Commission chose not to integrate the results of this study into a revised impact statement in *Ex Parte 281* which might have satisfied the requirements of the lower court. It was this impact statement, in *Ex Parte 270*, to which the CEQ referred in its letter to the Commision of December 2, 1974, complaining of the Commission's "apparent refusal" to integrate already completed studies of the underlying rate structure into its ongoing general revenue proceedings, including the present one. (See pp. 6a-8a, *infra*.)

IV. THIS COURT SHOULD NOT HOLD THAT THE COMMISSION SATISFIED NEPA WITHOUT PRODUCING AN ADEQUATE ENVIRONMENTAL IMPACT STATEMENT.

The Commission's principal argument here is that even if its final impact statement was inadequate as a basis for informed decisionmaking, this Court should nonetheless hold that NEPA has been complied with.

This argument takes two principal forms:

1. The Commission argues that it is impossible, in this or any subsequent general revenue proceeding, to analyze "not only the effects of the general rate increases under consideration, but also the basic rate structure upon which they are predicated." (Gov. J.S., p. 14). It therefore claims to need extraordinary relief from that requirement.

This argument rests upon a fallacy, namely that NEPA, but for this relief, would require the Commission to prepare a completely new and separate analysis of the underlying rate structure in every one of its general revenue proceedings. The Act, of course, imposes no such duty. Section 1500.6(d)(1) of the *CEQ Guidelines* for

preparation of impact statements [72] squarely covers this case with its provision that:

> "* * * In many cases, broad program statements will be required in order to assess . . . environmental impacts that are *generic or common to a series of agency* actions . . . . Subsequent statements on major individual actions will be necessary *where such actions have significant environmental impacts not adequately evaluated in the program statement.*" (Emphasis added.)

In other words, NEPA could be fully satisfied, for purposes of the Commission's general revenue proceedings, by the preparation of a "broad program statement" on the environmental effects of the underlying rate structure and alternatives thereto; by the periodic *updating* of this broad program statement as changing circumstances might require; and by the *adaptation* of this program statement, as updated, to meet the requirements of the Act in particular general revenue proceedings. The necessary adaptation, under § 1500.6(d)(1) of the *CEQ Guidelines*, *supra*, would consist of adding to the preexisting program statement new material on the marginal effects of the revenue order then under consideration. The Commission does not dispute that it is capable of analyzing these marginal effects within the time available in a general revenue proceeding.

Thus, once the Commission prepares an adequate "broad program statement" on the underlying rate structure, NEPA does not impose a particularly heavy burden in individual revenue proceedings. It is unlikely that the

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[72] CEQ, *Guidelines: Preparation of Environmental Impact Statements*, 40 C.F.R. § 1500 (1973). While the *CEQ Guidelines* lack the force of law, they have been held to be an authoritative interpretation of NEPA. *Greene County Planning Board* v. *Federal Power Comm'n*, 455 F.2d 412, 421 (2d Cir. 1972), *cert. den.*, 409 U.S. 849 (1972); *Scientists' Institute for Public Information*, *supra*, 481 F.2d at 1086-90.

environmental impact of the underlying rate structure will change radically from year to year, or from revenue proceeding to revenue proceeding—unless, of course, the Commission decides to reform its approach to such proceedings in order to comply with its specific statutory mandate to "enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources," NEPA, § 101(b)(6). But even reform would not be a matter of constantly recurring innovation, requiring repeated, wholly new environmental analyses.

In point of fact, the Commission has *already* produced what it claims to be an adequate environmental impact statement on the underlying rate structure for ferrous scrap versus iron ore.

With respect to non-ferrous scrap [73] the Commission has had more than five years, since the effective date of NEPA, in which to prepare the "broad program statement" that will enable it to comply easily and routinely with that Act in its general revenue proceedings. During the first two of those five years, the Commission never prepared an impact statement of any kind on any subject.[74] Almost three of those five years have elapsed since the start of the present litigation. Almost one of those five years has elapsed since the order now appealed from. The Court should look with some skepticism on the Commission's contention here that it still cannot assess the environmental impact of the underlying rate structure for non-ferrous scrap, even at this late date. The Court should bear in mind not only the Commission's prior history of making unsupported statements as a "strategem

[73] The Commission admits that with respect to "waste paper and non-ferrous metals" it "has computed [existing rate] differentials in favor of primary materials." See text at p. 12 n. 19, *supra*.

[74] See p. 9, n. 9, *supra*, and accompanying text.

for avoiding the requirements of NEPA," *SCRAP* v. *United States, supra,* 346 F.Supp. at 200, n. 16, but also that the Commission's present claim of impossibility is made in the form of conclusory assertions by appellate counsel, which are not subject to any evidentiary test.[75] *Cf. Overton Park, supra,* 401 U.S. at 419; *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 168-69 (1962); *Securities and Exch. Comm'n* v. *Chenery Corp.,* 318 U.S. 80, 87 (1943). Had the Commission chosen, instead of coming here, to return to the lower court with evidence that, despite good faith efforts, it still had to limit its consideration of the underlying rate structure to ferrous scrap—the "principal commodity in issue" (Gov.J.S., p. 14), and "the major recycled waste product" (Gov. Br., p. 9)— there is no reason to believe that the lower court would have responded unreasonably. See Fed.R.Civ.P. 60(b)(5), (6). As Judge Wright himself observed in *Scientists' Institute, supra,* 481 F.2d at 1092, "the statute [NEPA] must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible."

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[75] Thus, for example, the Commission asserts here that its "current study of the entire rate structure, Ex Parte 270 . . . was *commenced in 1970* and is still some years from completion." (Gov.Br., p. 45, emphasis added.) That account differs, at least in emphasis, from the one given by the lower court:

> "The Commission argues that an ongoing comprehensive investigation into the railroads' freight rate structure, Ex Parte 270, justifies its failure to consider the environmental impact of the underlying rate structure. That investigation, *having been delayed for several years, finally seems to be commencing* . . . ." 371 F.Supp. at 1305 (emphasis added).

The lower court cited the Commission's notice in the Federal Register instituting its investigation in *Ex Parte 270* Sub-Nos. 5 and 6, which did not appear until October 15, 1973. 38 Fed. Reg. 28596 (see A.717). The point is simply that to the extent the Commission's case turns on such finely nuanced factual issues (*e.g.,* questions about the amount of time required for certain studies or about their feasibility) this Court is not the ideal forum in which to determine the merits of that case.

But instead of seeking this limited relief in the lower court, which could have been carefully tailored to a determination of what constitutes "the fullest . . . possible" [76] compliance with NEPA in the present factual setting, the Commission decided to seek a full-scale confrontation in this Court. In this Court, the Commission argues not only that it cannot feasibly consider the underlying rate structure for *non-ferrous* scrap in its general revenue proceedings—but also that it cannot consider the underlying rate structure for *ferrous* scrap, on which it has *already* prepared a "broad program statement" which it claims to be adequate.

This position is part and parcel of the same obduracy which the Commission has maintained not only toward the lower court and appellees, but also toward the other federal agencies involved, since the outset of this proceeding.[77]

The Court should not lightly reward that obduracy. In Chief Judge Friendly's well-chosen words (written with respect to this same Commission):

> "To permit an agency to ignore its duties under NEPA with impunity . . . would subvert the very purpose of the Act and encourage further administrative laxity in this area . . . . [P]reservation of

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[76] NEPA, 42 U.S.C. § 4332; *National Helium, supra*, 486 F.2d at 1001.

[77] See pp. 8-13, *supra*. See also A. 567-68 (letter from CEQ to the Commission, dated Oct. 30, 1972, saying that "wholly apart from the Commission's conclusion concerning the environmental impact of its action in *Ex Parte 281*, we are disturbed by the repeated reference throughout the [Commission's] report [of Oct. 4, 1972] to the Commission's inability . . . to adapt to the requirements of NEPA. If manpower problems are preventing effective implementation of the Act, we would have expected the Commission to be alert to this problem earlier. With almost three years having elapsed since the passage of NEPA, lack of resources no longer appear to us to justify—if they ever did—less than full compliance with the policies and procedures of NEPA . . . .")

> the integrity of NEPA necessitates that the [Interstate Commerce] Commission be required to follow the steps set forth in § 102 . . . ." *City of New York* v. *United States*, 337 F.Supp. 150, 160 (E.D.N.Y. 1972) (three-judge court).

The "integrity of NEPA" is very much in issue here. This case represents the first time that the Court has given plenary consideration to the question of what constitutes an adequate environmental impact statement, and how that adequacy is to be determined. The case will inevitably be looked to by the lower courts and the agencies for broad guidance in interpreting NEPA. Should the Court now hold that the Commission complied with NEPA without considering any part of the underlying rate structure in an impact statement on a general revenue order—*even where such consideration is plainly feasible, as it is for ferrous scrap*—the message to other agencies would be lamentably clear. They would be invited to argue in future cases that whenever environmental analysis of a proposed agency action involved a question which was particularly significant, or even, as a practical matter, particularly embarrassing to the agency, consideration of that question could be deferred while the agency proceeded with its action. No matter how carefully the Court might seek to limit such an invitation, the agencies could not be prevented from testing, and attempting to stretch, those limits. Additionally, there would be an incentive for the agencies to refrain from preparing early, overall environmental analyses, as required by the *CEQ Guidelines*, 40 C.F.R. § 1500.6(d), so that they could later reap the benefits of their foot-dragging, as the Commission seeks to do here. These results would be especially serious because NEPA depends for its effectiveness largely on agency self-policing;[78] only a small handful of the thousands of

[78] See CEQ, *Fifth Annual Report*, pp. 371-413 (1974).

impact statements produced to date have ever become the subject of litigation.

A rule permitting agencies to defer consideration of difficult or embarrassing environmental questions, while action proceeds, would return the agencies to the very situation which led Congress to enact NEPA. Congress made plain that NEPA was intended to cure a situation in which:

> "Environmental problems are only dealt with when they reach crisis proportions. Public desires and aspirations are seldom consulted. Important decisions concerning man's future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades." S. Rep. No. 91-296, 91st Cong., 1st Sess. 5 (1969).

The legislative history shows that § 102(2)(C) of NEPA was conceived as an "action forcing" device, designed to require agencies to give full consideration to the environmental consequences of their proposed activities. Without such an "action forcing" mechanism, it was feared, NEPA would amount to "lofty declarations [and] nothing more than that." [79] To the extent that NEPA "forces" consideration of environmental factors, it does so by requiring that such consideration *precede* substantive agency action.[80] Section 102(2)(C)'s "action

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[79] *Hearings on S.1075, S.237 and S.1752 Before the Committee on Interior and Insular Affairs, United States Senate*, 91st Cong., 1st Sess. 116 (1969), (remarks of Sen. Jackson). *Hearings on S.1075, S.237 and S.1752, id.*, at 112-122; S.Rep. No. 91-296, 91st Cong., 1st Sess. (1969); Conf. Rep. No. 91-765, 91st Cong., 1st Sess. (1969); 115 Cong.Rec. 19009-11, 29087, 39701-04, 40415-27, 40923-28 (1969). Hanks and Hanks, *An Environmental Bill of Rights*, 24 Rutgers L.Rev. 231, 251-65 (1970). *See also Calvert Cliffs', supra*, which exhaustively discusses the legislative history of NEPA.

[80] *See, e.g., Wyoming Outdoor Coordinating Council* v. *Butz*, 484 F.2d 1244, 1249-50 (10th Cir. 1973); *Silva* v. *Romney*, 473 F.2d

forcing" mechanism would dissolve if environmental considerations could be postponed to a study which could be completed at the agency's leisure, while the substantive action went ahead.

Moreover, if this Court were to hold that the Commission need not comply with NEPA "to the fullest extent possible" in this proceeding, the result would be to cast grave doubt on a large and sound body of case law developed in the lower courts over the five years since NEPA's enactment. The clear import of this case law is that NEPA requires strict compliance with its procedures, and that mere administrative inconvenience—such as that claimed here—does not excuse noncompliance.[81]

This is not the kind of "hard case" which might justify the creation of bad law. The Commission is now under a declaratory judgment that its present final impact statement in *Ex Parte 281* is inadequate. While the court below directed the Commission to reconsider the rate increases authorized in *Ex Parte 281* in an adequate statement, and to hold a hearing thereon, no sanctions of any practical consequence attach to that direction. The court granted no injunctive relief, and the increased rates approved by the Commission are still being collected by the railroads.

Moreover, this case could not be disposed of simply by holding for the Commission on the need to consider the underlying rate structure in a general revenue proceeding. The Court would still have to deal with the other fundamental inadequacies in the Commission's im-

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287 (1st Cir. 1973); *Davis* v. *Morton*, 469 F.2d 593 (10th Cir. 1972); *Scherr* v. *Volpe*, 466 F.2d 1027 (7th Cir. 1972); *Lathan* v. *Volpe*, 455 F.2d 1111, 1121 (9th Cir. 1971); *Calvert Cliffs'*, *supra*, 449 F.2d at 1128-29; *Stop H-3 Ass'n* v. *Volpe*, 353 F.Supp. 14, 17 (D.Hawaii 1972).

[81] *See, e.g.*, cases collected n. 80, *supra*.

pact statement, and with the Commission's subversion of the interagency consultation requirement of § 102(2)(C). Were the Court to hold the Commission in compliance with NEPA on the present set of facts, all agencies would be on notice that the impact statement requirement of § 102(2)(C) was a mere formality, and that adverse comments could be disregarded with impunity, without the barest effort at a reasoned response.

Sacrifice of the integrity of this statute, on which Congress plainly placed the highest hopes,[82] is far too great a price to pay to extricate the Commission and the Railroads from a situation which causes them no identified practical harm, and which, in any event, is of the Commission's own making.

2. The Commission claims that § 102(2)(C) was satisfied here because, quite apart from the adequacy or inadequacy of the Commission's final impact statement, "environmental considerations pervaded Ex Parte 281." (Gov.Br., pp. 24-26.) This is essentially the same claim of "substantial compliance" which the Seventh Circuit considered and rejected in *Scherr* v. *Volpe*, 466 F.2d 1027 (7th Cir. 1972). In *Scherr*, defendants urged that even in the absence of an adequate final impact statement, "NEPA has been complied with . . . because environmental considerations were expressly taken into account. . . ." *Id.* at 1033. The court gave short shrift to this attempt to make compliance with § 102(2)(C) of NEPA a matter of the agency's subjective mental state, and held, *id.* at 1030, that:

> "Section 102 of NEPA provides that its procedures be implemented and carried out 'to the fullest extent possible.' Thus the somewhat flexible and general guidelines articulated in Section 101 are not to

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[82] See the discussion of the legislative history in *Calvert Cliffs'*, *supra*.

> be found in Section 102 . . . . The procedural steps outlined in Section 102 apply notwithstanding considerations of administrative difficulty, delay or economic cost. Calvert Cliffs' Coord. Com. v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1115 (D.C. Cir. 1971)."

Likewise, in *Scientists' Institute for Public Information* v. *Atomic Energy Comm'n*, 481 F.2d 1079 (D.C.Cir. 1973), the court held that NEPA could not be satisfied by an "environmental survey" which failed to meet the specific requirements of § 102(2)(C).

> "To the extent the Commission's 'environmental survey' would not be issued in accordance with NEPA's procedures for preparation and distribution, it is not an adequate substitute for a NEPA statement. These procedural requirements are not dispensable technicalities, but are crucial if the statement is to serve its dual functions of informing Congress, the President, other concerned agencies and the public of the environmental effects of agency action, and of ensuring meaningful consideration of environmental factors at all stages of agency decision making." *Id.* at 1091.

The rule, then, is that compliance with § 102(2)(C), if it is to be found, must be found in an adequate final impact statement, drafted in consultation with other "Federal agenc[ies] which [have] jurisdiction by law or special expertise with respect to any environmental impact involved," according to the specific procedural requirements of § 102(2)(C).[83] Were the rule otherwise,

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[83] *See also Environmental Defense Fund* v. *Froehlke*, *supra*, 473 F.2d at 350 ("The Corps argues that despite these omissions its impact statement should be considered sufficient because 'at every step of the way . . . the voices of fish and wildlife interests have been heard. . . .' We disagree."); *Greene County Planning Board* v. *Federal Power Comm'n*, 455 F.2d 412, 421-22 (2d Cir. 1972), *cert. den.*, 409 U.S. 849 (1972); *Committee to Stop Route 7* v. *Volpe*, 346 F.Supp. 731, 738 (D.Conn. 1972); *cf. Chemical Leaman Tank Lines*, *supra*, 368 F.Supp. at 946-49.

there would be no guarantee that a final impact statement would furnish parties outside the agency—including the President and Congress as "ultimate decisionmakers"—with sufficient information for informed decisionmaking. *Scientists' Institute, supra,* 481 F.2d at 1091; *Natural Resources Defense Council* v. *Morton, supra,* 458 F 2d at 833; *Calvert Cliffs' Coord. Comm.* v. *Atomic Energy Comm'n, supra,* 449 F.2d at 1114 (D.C.Cir. 1971).

Moreover, in arguing here that it has substantially complied with NEPA without reference to the adequacy or inadequacy of its final impact statement, the Commission places a serious strain on certain parts of the factual record.[84] To pick three examples:

a. The Commission points, in support of its claim that "environmental considerations pervaded Ex Parte 281," to a "draft environmental impact statement which [it] served on March 6, 1972." (Gov. Br., p. 25.) But the Commission fails to mention the district court's uncontested finding that this cursory, six-page document[85] was "premised on facts [the Commission] knew to be false," *SCRAP* v. *United States, supra,* 346 F.Supp. at 194, or the fact that:

> "[T]he President's Council on Environmental Quality (CEQ) and the Environmental Protection Agency [both] roundly condemned [this] draft statement as insufficient." *Id.*

b. The Commission points, again for the same purpose, to its request on December 21, 1971, that "the *railroads* . . . file an environmental impact statement," a request with which "they complied on January 3, 1972," just two weeks later. (Gov. Br., pp. 24-25; emphasis added.) The Commission fails to mention that this attempted dele-

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[84] *Compare* p. 9, n. 9, *supra,* and p. 67, n. 75, *supra.*

[85] Compare *Monroe County, supra,* 472 F.2d at 697-98.

gation of federal NEPA responsibilities to financially interested applicants for federal action is, at the very least, of questionable legality. See *Greene County Planning Board* v. *Federal Power Comm'n, supra,* 455 F.2d at 420-21, where the Second Circuit expressly held such delegation unlawful on the ground that:

> "The danger of this procedure . . . is the potential, if not likelihood that the applicant's statement will be based upon self-serving assumptions. * * * [A]lternatives might be lost as the applicant's statement tended to produce a *status quo* syndrome." [86]

In any event, the Commission makes no claim here that the statement thus produced by the Railroads was adequate in terms of its contents to satisfy NEPA, or even that it materially aided in analysis of the issues. The Commission claims only that "all were entitled to comment." (Gov. Br., p. 25).

c. The Commission points, once more for the purpose of demonstrating that "environmental considerations pervaded Ex Parte 281," to its publication in March, 1973, of "a comprehensive bibliography of literature bearing on the environmental effects of rate increases," (Gov. Br., p. 26). But it fails to mention the unchallenged comment of the Department of Commerce that while this was:

> "an excellent and timely bibliography . . . , [t]he candid reader cannot help but contrast this list with the dated references cited throughout the text of the [accompanying] draft [impact] statement . . . [of which] many date back 3-4 decades. The textbook references [in the draft impact statement]

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[86] *See I-291 Why? Ass'n* v. *Burns,* 372 F.Supp. 223, 243-46 (D. Conn. 1974); *Conservation Society of Southern Vermont* v. *Sec'y of Transportation,* 362 F.Supp. 627, 630-31 (D.Vt. 1973), *aff'd,* 7 ERC 1236 (2d Cir. 1974); *Committee to Stop Route 7* v. *Volpe, supra,* 346 F.Supp. at 741.

> . . . are equally dated in terms of the national environmental, energy, and raw material concerns of the past five years." (A. 579).

The Commission's substantial compliance argument, then, comes down to a claim that while one plainly inadequate attempt to comply may not satisfy NEPA, several successive inadequate attempts *will* satisfy that Act, because they demonstrate by sheer number, weight, or volume that "environmental considerations [were] perva-[sive]." The Commission stops just short of claiming that, having failed more than once to comply with NEPA, it is now judgment-proof with respect to an order directing it to do so—and that the persons to whom the Commission owes that duty should therefore cease to press for its performance. But as the Commission demonstrated in *Ex Parte 295* and in *Ex Parte 270*, such a claim would give the Commission's abilities too little credit.

V. THE DISTRICT COURT CORRECTLY HELD THAT THE COMMISSION'S IMPACT STATEMENT WAS REQUIRED TO BE MADE AVAILABLE IN DRAFT FORM PRIOR TO ITS ORAL HEARING IN *EX PARTE 281*.

The issues raised by the Commission's failure to release its draft impact statement (A.200) prior to its oral hearing in *Ex Parte 281* are relatively simple and straightforward.

1. NEPA itself does not require that an oral hearing be held on proposed agency action. It requires only that where such a hearing *is* held, an impact statement be made available prior to the hearing, *i.e.*, that the statement "accompany the proposal through the existing agency review processes." [87] NEPA, § 102(2)(C). The *CEQ*

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[87] The Commission's brief (p. 47) to the contrary, there is no basis for reading the statutory term "the proposal" as referring

Guidelines, which the courts have recognized as an authoritative gloss on NEPA,[88] require in more explicit terms that:

> "To the fullest extent possible, all . . . hearings [on proposed agency action] shall include consideration of the environmental aspects of the proposed action. * * * Agencies should make any draft environmental [impact] statements to be issued available to the public at least fifteen (15) days prior to the time of such hearings." 40 C.F.R. § 1500.7(d).

2. It is not contested that the "existing agency review processes" in *Ex Parte 281* included an oral hearing. This oral hearing was held on June 15 and 16, 1972. Nor is it contested that the Commission failed to produce its draft impact statement until March, 1973, nine months after that hearing.

3. The district court found as a factual matter not only that an oral hearing was held in *Ex Parte 281*, but that such oral hearings are "customarily" held in the Commission's general revenue proceedings, 371 F.Supp. at 1301, 1307. On this basis, the oral hearing in *Ex Parte 281* was not only part of the "existing agency review processes," (NEPA § 102(2)(C); emphasis added), but also part of the "customar[y]" agency review processes. The Commission now disputes this factual finding as to what is customary, solely on the basis that in two general revenue proceedings *subsequent* to *Ex Parte 281*, no oral hearings were held. The Commission points to no general

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only to proposals *originating within* a federal agency. A large proportion of the "proposals" on which impact statements are required originate (as here) with applicants for federal action. *See, e.g., Greene County, supra; Lathan* v. *Brinegar, supra.*

[88] See cases cited, n. 65, n. 72, *supra.*

revenue proceeding *prior* to or including *Ex Parte 281* in which an oral hearing was dispensed with.[89]

4. The real issue as to an oral hearing is *not* whether the lower court was correct in holding that the Commission was required in *Ex Parte 281* to produce its draft impact statement prior to the hearing. The court plainly was correct on that point. The real issue is one as to appropriate relief, namely whether, a year after the lower court's order, the Commission should be required to hold another oral hearing in *Ex Parte 281* on issues that may (*or may not*) have been rendered academic by the passage of time and by intervening events. It is that issue to which we next turn in the concluding section of this brief.

VI. IF THIS COURT REACHES THE MERITS, IT SHOULD AFFIRM THE JUDGMENT OF THE LOWER COURT.

While this case may not be moot in the technical sense, its connection with the real world is tenuous, and likely to become more so.[90] The sole effect of the lower court's order was to deprive the Railroads of an argument they *might* make in administrative proceedings which *might* occur, but never *have* occurred. The likelihood that such proceedings *will* ever occur, or that the Railroads will suffer any practical harm as a result of their inability to

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[89] The Commission urges that oral hearings have been frequently dispensed with in *other* types of proceedings held under § 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7), but does not explain why these other types of proceedings are relevant to the issue of customary practice in general revenue proceedings. (Gov. Br., p. 50, n. 20.)

[90] Had this case arrived here by the certiorari route, it would plainly be appropriate to dismiss the writ of certiorari as improvidently granted. *See, e.g., McClanahan* v. *Morauer & Hartzell, Inc.*, 404 U.S. 16 (1971); *Benz* v. *New York State Thruway Auth.*, 369 U.S. 147 (1962).

make that argument, has obviously diminished with the passage of time, and with the Commission's approval of subsequent general revenue orders. A lot of water has passed under the bridge in the year since the lower court's order.

The one interest at stake here which is still more than academic is what Chief Judge Friendly has called the "integrity of NEPA." *City of New York, supra*, 337 F. Supp. at 160. This Court runs the risk that in reaching out to decide the academic questions presented here, it will inadvertently decide issues which are of great importance elsewhere, on the basis of a highly unusual factual record which affords little insight into the interests which may there be at stake. Any holding here that the Commission has satisfied NEPA would have powerful repercussions in instances which bear little resemblance to the present one, and which deserve to be considered on their own merits, or at least on the basis of a more representative case. These repercussions would affect not only the relatively few cases where litigation has occurred under NEPA, but also the far greater number of cases where the question is how seriously the agencies will take that statute.

The Commission and the Railroads have not demonstrated any actual harm to themselves arising out of the lower court's judgment. Had they wished to petition the lower court for a modification of its judgment in light of changed circumstances, newly performed studies, or any other considerations, they could have done so at any time during the past year, and they could still do so today. Fed.R.Civ.P. 60(b) (5), (6). Indeed their failure to do so in light of the impact statements in *Ex Parte 295* and *Ex Parte 270* is one of the abiding mysteries of the case. Likewise, appellants could still return to the lower court tomorrow if this Court now affirmed the judgment of that court. And there is no basis for assuming that the lower

court—which is far better equipped than this Court to evaluate claims of changed factual circumstances—would respond unreasonably to whatever they might show.

In sum, if this Court reaches the merits, the district court should be affirmed. The district court's judgment was clearly correct, and no showing has been made that the district court, in deciding the case correctly, caused appellants any practical injury which demands extraordinary relief.

CONCLUSION

These appeals should be dismissed for want of jurisdiction under 28 U.S.C. § 1253. Alternatively, the judgment of the lower court should be affirmed.

Respectfully submitted,

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February, 1975

APPENDIX

28 U.S.C. § 1253 provides:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

Chapter 157 of Title 28 (§§ 2321-25) provided, prior to its amendment by P.L. 93-584 (Jan. 2, 1975):

> "§ 2321. The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.
>
> "The orders, writs, and process of the district courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States.
>
> "§ 2322. All actions specified in section 2321 of this title shall be brought by or against the United States.
>
> "§ 2323. The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.
>
> "The Interstate Commerce Commission and any party or parties in interest to the proceeding before

the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

"Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

"The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein.

"§2324. The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action.

"§ 2325. An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

Public Law 93-584 (Jan. 2, 1975) provides in relevant part:

"Sec. 5. Section 2321 of title 28, United States Code, is amended to read:

'§ 2321. Judicial review of Commission's orders and decisions; procedure generally; process

'(a) Except as otherwise provided by an Act of Congress, a proceeding to enjoin or suspend, in whole or in part, a rule, regulation, or order of the Interstate Commerce Commission shall be brought in the court of appeals as provided by and in the manner prescribed in chapter 158 of this title.'

* * * *

"Sec. 7. Sections 2324 and 2325 of title 28, United States Code, are hereby repealed.

* * * *

"Sec. 10. This Act shall not apply to any action commenced on or before the last day of the first month beginning after the date of enactment. However, actions to enjoin or suspend orders of the Interstate Commerce Commission which are pending when this Act becomes effective shall not be affected thereby, but shall proceed to final disposition under the law existing on the date they were commenced."

Section 102 of the National Environmental Policy Act, 42 U.S.C. § 4332, provides in relevant part:

"The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality * * *, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and

shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources[.]"

EXECUTIVE OFFICE OF THE PRESIDENT

COUNCIL ON ENVIRONMENTAL QUALITY
722 Jackson Place, N.W.
Washington, D.C. 20006

December 2, 1974

Dear Fritz:

Since my letter to you of November 6, 1974, the Council on Environmental Quality staff has had an opportunity to review more thoroughly your final impact statement prepared in connection with Ex Parte No. 295 (Sub-No. 1). This statement represents a substantial improvement over your earlier statements on the environmental effects of increased freight rates on recyclable materials. The statement displays a sharper focus on the key issues, and the Commission is to be commended on the progress made.

A comparison of the impact statement for Ex Parte No. 295 (Sub No. 1) with the impact statement prepared for Ex Parte No. 281 clearly shows the improvement which has so far occurred. However, neither of these statements contain an analysis of the underlying freight rate structure. The Commission has recently demonstrated its ability to develop this type of analysis in its final impact statement for Ex Parte No. 270 (Sub-No. 5) *Investigation of Railroad Freight Rate Structure—Iron Ores* and Ex Parte No. 270 (Sub-No. 6) *Investigation of Railroad Freight Rate Structure—Scrap Iron and Steel.* And henceforth, it should be a relatively simple matter for the Commission to update these analyses, and use them in connection with future rate increase proposals being investigated by the Commission. We are concerned, however, over the apparent refusal by the Commission to use these analyses in rate increase proceedings which are still ongoing, such as Ex Parte No. 281, and thus the continuing delay in applying an analysis of the un-

derlying rate structure to the Commission's revenue proceedings.

During the first few years after adoption of the National Environmental Policy Act, it was perhaps inevitable that agencies would focus their environmental efforts on the new proposals that were being generated. The more basic and, in many cases, much more important inquiry into the continuing effects of the programs under an agency's jurisdiction frequently received lower priority. However, the grace period for completing this inquiry has clearly elapsed.

In the case of the ICC, the proceedings in Ex Parte No. 270 have extended, so far, over four years. In that period, a significant number of freight rate increases on recyclable commodities have been approved, involving what were basically across-the-board percentage increases applied to the existing rate structure. These increases have exacerbated any discrimination against recyclables that may exist. Moreover, it is still not clear when the Commission intends to integrate its analysis of the underlying rate structure into its periodic investigations of new, proposed rate increases, and what action might be taken to rectify past decisions made without the benefit of analyses of the underlying rate structure. We wish to affirm the position taken by Mr. Train in his October 30, 1972 letter to Mr. Stafford, and the position taken by Commissioner Brown, that the Commission postpone any rate increases on recycled commodities until Ex Parte No. 270 is concluded.

I would appreciate hearing from you on this matter. As you know, I personally stand ready to assist in any way that I can.

Sincerely,

Gary Widman
General Counsel

Mr. Fritz R. Kahn
General Counsel

Interstate Commerce Commission
12th and Constitution Avenue, N.W.
Washington, D.C. 20423

FEB 11 1975
MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 73-1966 and 73-1971

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.) ET AL., *Appellees*

ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL., *Appellants*

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.) ET AL., *Appellees*

On Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEES NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., COMMERCIAL METALS CO., I. V. SUTPHIN CO. AND FRANKEL BROS. & CO. INC.

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BRIEF FOR APPELLEES NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., COMMERCIAL METALS CO., I. V. SUTPHIN CO. AND FRANKEL BROS. & CO. INC.

OPINIONS BELOW

The opinion of the three-judge district court is reported at 371 F. Supp. 1291. The Interstate Commerce Commission's opinion and order issued October 4, 1972 is reported at 341 I.C.C. 290. The Commission's final environmental impact statement in *Ex Parte 281* is reported at 346 I.C.C. 88. The Commission's order of May 2, 1973 is not reported, but can be found in Appendix E to the Government's Jurisdictional Statement in this case.

JURISDICTION

Appellees contend this Court has no jurisdiction over the two direct appeals here involved under the provisions of 28 U.S.C. § 1253, and they urge the Court to reconsider appellees' earlier motion to dismiss for lack of direct appellate jurisdiction.

QUESTIONS PRESENTED

1. Whether appellants are entitled, under 28 U.S.C. § 1253, to maintain a direct appeal to this Court from a district court order which refused to grant injunctive relief and where no appeals have been taken by those who were denied injunctive relief.

2. Whether the district court had jurisdiction to review orders issued by the Interstate Commerce Commission under 49 U.S.C. § 15(7) in response to complaints alleging that said orders violated provisions of another federal statute, the National Environmental Policy Act (NEPA), 42 U.S.C. § 4331 et seq.

3. Whether the Interstate Commerce Commission, which has an established record of adamantly refusing

to comply with the plain requirements of Section 102(2)(C) of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C), may lawfully ignore those statutory directives by arbitrarily failing and refusing to prepare any acceptable or sustainable Environmental Impact Statement *prior* to the rendition of its *final* decision and order in a nationwide freight rate increase proceeding, wherein it expressly approved another across-the-board, unreasonable, discriminatory, pyramidic increase in transportation rates for recyclable wastepaper, textiles and scrap metal.

4. Whether the Interstate Commerce Commission may lawfully defeat and circumvent the plain requirements of Section 102(2)(C) of NEPA by waiting until several months *after* it has already rendered a final decision and order in a nationwide freight rate increase proceeding, wherein it expressly approved another across-the-board increase in transportation rates for recyclable commodities, to prepare *for the first time,* a *post-mortem* Environmental Impact Statement, the sole purpose of which is to rationalize, *nunc pro tunc,* the rate increase theretofore approved seven months before.

5. Whether the Interstate Commerce Commission, which is obliged by Section 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7), to hold meaningful hearings to determine the *"lawfulness"* of proposed rate increases, may properly issue a final order approving such rate increases and only *thereafter* consider the *"lawfulness"* of such approved increases under the National Environmental Policy Act in *post-decision* proceedings that flatly deny the right to any hearing on the *new issues* thus belatedly raised.

6. Whether in a case of this nature where the Commission has constantly exhibited hostility to the requirements of the National Environmental Policy Act, the district court properly exercised its judicial power to review not only the *form* of the Commission's alleged, belated compliance with NEPA, but the *substance* of that alleged compliance as well; and where the court found the Commission's alleged compliance to be seriously inadequate or capricious, was it proper for the court to remand the case to the Commission for further administrative proceedings consistent with the court's decree.

COUNTER-STATEMENT OF THE CASE

Appellee National Association of Recycling Industries, Inc. (NARI) is the trade association for the wastepaper, textile and non-ferrous metals recycling industries. NARI intervened as a plaintiff in the case below to represent the interests of its 700 members, all of whom engage in the collection, processing or manufacturing utilization of the aforementioned recyclable commodities.

Appellees Commercial Metals Co. of Dallas, Texas, I.V. Sutphin Co. of Cincinnati, Ohio, and Frankel Bros. & Co. Inc. of Rochester, New York also intervened as plaintiffs in the district court. Each is engaged in the recycling of solid waste materials which, if not so utilized, would have been burned, buried or otherwise disposed at public expense, with obvious adverse effects on the environment; and all, of course, use the nation's railroads to ship recyclable commodities.

Recyclable wastepaper utilized by NARI's membership competes with virgin pulpwood or woodpulp in the nation's paper and boxboard manufacturing industries.

Similarly, recyclable non-ferrous metals (aluminum, copper, lead, zinc, etc.) and virgin non-ferrous ores and concentrates are competing raw materials in metal manufacturing, while recyclable textiles compete with virgin fibers throughout the textile manufacturing industry. By and large, these competing virgin and recyclable commodities are interchangeable in manufacturing processes, and where they are not completely substitutable, manufacturers use one as a supplement for the other to produce various types and grades of goods and products.

Almost without exception, the virgin commodities in each of the industries mentioned above are able to demand raw material prices far in excess of those manufacturers are willing to pay for competing recyclable counterparts. Pulpwood or woodpulp, for example, is typically sold at prices far higher that those simultaneously paid for competing wastepaper, and the same situation applies to competing sales of virgin ores and recyclable scrap, and those involving virgin and recyclable textiles.

Thus, from the very outset, one is tempted automatically to conclude that certainly the high-priced virgin commodities must be paying higher transportation rates than those exacted for the movement of competing, low-priced recyclable commodities. Unfortunately, however, the record in this case demonstrates that this is *not* true. On the contrary, the record before this Court shows that the railroad freight rate system administered by the Interstate Commerce Commission, in partnership with the nation's railroads, has created an abominable, incongruous situation where environmentally-charged, low-priced recyclable commodities have been compelled, for a long period of years, to pay

rates far higher than those charged for the transportation of competing virgin commodities, and that the situation is getting worse with each passing year. In this connection, the record shows:[1]

Pulp v. *Wastepaper*

(1) In 1959, the *average nationwide rates* charged by the railroads for the transportation of competing pulp and wastepaper were:

Pulp	17.4¢ per cwt.
Wastepaper	31.3¢ per cwt.
Net Difference:	13.9¢ per cwt. in favor of virgin pulp.

(2) By 1971, as a result of % rate increases sought by the railroads and approved by the Commission in a series of *Ex Parte* proceedings, the *average nationwide rates* for the transportation of these two commodities had changed as follows:

Pulp	24.4¢ per cwt.
Wastepaper	43.0¢ per cwt.
Net Difference:	18.6¢ per cwt. in favor of virgin pulp.

(3) Since 1971, the railroads have continued to seek, and the Commission has either approved or is in the process of studying, the following additional % rate increases for the transportation of these competing commodities (in some cases, however, pulp was expressly exempted from any increase whatsoever):

---

[1] See Commission's Environmental Impact Statement, *Ex Parte 281*, App. 146, 147.

Rate Increase Case	Year	% Increase
Ex Parte 281	1972	2.5% surcharge, plus 3%
Ex Parte 295, Sub. 1	1973	3%
Ex Parte 299	1974	2.8%
Ex Parte 303	1974	3.3% plus 10%[2]
Ex Parte 310	1975	7%[3]

When and if the two last mentioned % increases go into effect as have the others mentioned above, the competitive transportation situation for competing pulp and wastepaper will be as follows, on an average nationwide rate basis:

Pulp	30¢ per cwt.
Wastepaper	58¢ per cwt.
Net Difference:	28¢ per cwt. in favor of virgin pulp.

Non-Ferrous Ores v. *Metal Scrap*

The picture is very much the same for competing non-ferrous ores or concentrates and metal scrap. The record before the Court demonstrates that—

(i) In 1959, the virgin ores enjoyed a favorable 13.3¢ per cwt. average nationwide rate differential;

(ii) By 1971, the differential in favor of the virgin commodity had grown to 17.7¢ per cwt.; and

(iii) In 1975, the *differential* in favor of the virgin commodity will expand to 34¢ per cwt., when

[2] The Commission authorized the railroads to put the 10% increase into effect by individual tariff filings, and the railroads, as a group, are now proceeding to put the increase into effect.

[3] The railroads' application is now before the Commission for action.

and if the *Ex Parte 305* and *310* increases are put into effect as aforesaid.[4]

The severe adverse impact of these constantly-expanding rate disparities on the ability of recyclable commodities to compete with their virgin competitors in the marketplace is not fully understood until one realizes, as conceded by the Government in its brief,[5] that (a) transportation costs often far exceed the price paid for low-value recyclable wastepaper, textiles and scrap, and (b) manufacturing plants are traditionally located much nearer to the mines and forests where virgin commodities are found than to the large metropolitan areas where wastepaper, recyclable cans and textiles are collected from the solid waste stream—meaning, of course, that longer travel distances necessarily impose greater transportation costs, at disproportionately higher rates, on the competing recyclable materials.

This explains in large part, therefore, why our national recycling rates have actually declined in recent years and are threatened with further deterioration. Statistics compiled by the Environmental Protection Agency and made available to the Commission demonstrate that the following national recycling rates *inter alia* are already dangerously low—

Commodities	Current Recycling Rates
Textiles	4%
Zinc	13%
Aluminum	18%
Wastepaper	19%

[4] Similar inexplicable rate disparities exist in favor of virgin textile fibers, which, as aforesaid, compete with recyclable textile materials.

[5] See Government's brief, pg. 30.

In wastepaper, for example, the EPA statistics show that, as recently as 1952, our national recycling rate was 27%, and that in other countries such as Japan, the present recycling rate is far higher. Moreover, while our recycling rates have been declining, the national production of solid waste materials has been dramatically increasing. In textiles, EPA warns that while the recycling rate is an almost meaningless 4%, the production of textiles in this country will increase from 10 billion pounds in 1970 to 15 billion pounds in 1980. The same statistics, which were available to the Commission in this case, demonstrate that, in paper, the national production in 1969 was 58.5 million tons, less than 20% of which was recycled, leaving more than 42 million tons to be burned or buried. By 1980, EPA and the paper industry itself project that the consumption of paper in the United States will grow to 80 million tons a year, and that unless the current recycling rate of only 19% is significantly increased, rather than decreased, our nation is in danger of being buried in its own undisposed, unrecycled trash.[6]

Simultaneously, of course, other agencies of the Federal Government have repeatedly warned the Congress and the President that our nation is also in danger of exhausting its supplies of precious ores and pulp in the years ahead, and that unless we reduce our voracious industrial consumption of these virgin materials, we will be forced to depend on foreign imports, particul-

[6] See also 1970 Report to Congress, President's Council on Environmental Quality, pgs. 105-108; June 1, 1972 Report to the President, Citizens' Advisory Committee on Environmental Quality; March, 1973 Report to EPA by National League of Cities-U.S. Conference of Mayors, entitled "*Cities and the Nation's Disposal Crisis.*"

arly in metals—and, of course, increased dependence on imports submits the United States to new foreign sources of cartel pricing and commodity embargoes, as well as serious damage to our already strained balance of payments position.[7] In 1973, the Director of EPA's Office of Solid Waste Management described the situation in pulp, in sworn testimony as follows:[8]

> "The U.S. Forest Service has predicted that by the year 2,000 a shortage of 20 billion board feet of softwood saw timber will exist. . . . The shortage would reach 10 billion board feet by 1980. 1 million tons of wastepaper recycled saves 1.4 billion board feet of timber, which could to some extent be used to offset this projected timber shortage. . . .
>
> "The land commitment required to produce an annual timber growth sufficient to yield 1 million tons of pulp per year is roughly 2.5 million acres.
>
> "Each ton of paper recycled would allow land to be used for other purposes, such as lumber production or for a non-forestry function, such as recreation."

---

[7] See 1970 Report to Congress, President's Council on Environmental Quality, pg. 158; June 1973 Final Report to the President and the Congress, The National Commission on Materials Policy; 1973 Report to Congress, Environmental Protection Agency; March, 1973 Report to EPA by National League of Cities-U.S. Conference of Mayors, entitled *"Cities and the Nation's Disposal Crisis"*; April 5, 1973 Report of The Council of State Governments, entitled *"The States' Roles in Solid Waste Management"*; May 21, 1973 issue of *Newsweek* magazine, which stated: "As Government officials and environmentalists search for ways to cut the drain on the nation's natural resources, their thoughts turn increasingly to recycling."

[8] Federal Maritime Commission Docket 72-35, *Pacific Westbound Conference—Waste Paper and Woodpulp Investigation*, Record, 654-655.

Similarly, in metals, the U.S. Geological Survey, in a publication entitled "United States Mineral Resources" (U.S. Geological Survey Paper No. 820, 1973), geographically illustrated the dangerous tendency of growing U.S. dependence on foreign basic raw materials. In summary, the Survey reported that, of the 13 basic industrial raw materials required, the U.S. *in 1950* was dependent on imports for more than ½ of its supplies of *four — aluminum, manganese, nickel* and *tin; by 1970,* the list had increased to *six,* as *zinc* and *chromium* were added; *by 1985,* the U.S. will depend on imports for more than ½ of its supplies of *nine* basic raw materials—as *iron, lead* and *tungsten* are added to the list; and by the *end of the century,* our country will depend on foreign sources for more than ½ of its supply of *each of the 13 raw materials* except phosphate. (See also Geological Survey Circular No. 698, entitled "Mineral Resources: Potentials and Problems")

Faced with these gloomy predictions, the Deputy Assistant Secretary of the Interior for Mineral Resources, described the ultimate financial implications for the United States in this manner:[9]

> "In the case of metals, the forecast indicates a continuing rapid rise in demand, but at the same time, a very small increase in supply from domestic sources.
>
> "This results in a forecast that, in metals, reliance on foreign sources will increase from Five Billion in 1970 to an annual level of Sixteen Billion Dollars by 1985 and to a staggering Thirty-Six Billion Dollars by the year 2000.
>
> "And that is what can happen unless something is done."

---

[9] "Minerals In The Future," June 16, 1973 by Dep. Asst. Secretary of the Interior Rigg; See also May 21, 1973 issue of Newsweek Magazine.

Finally, in the vitally important energy area, the Atomic Energy Commission and EPA conducted separate studies which proved that industrial utilization of recyclable commodities in place of competing virgin materials results in vast savings of precious oil and gas. In a report entitled "Energy In Solid Waste," issued in early 1975, the President's Advisory Committee on Environmental Quality stated, at page 5:

> "From an energy conservation point of view, the . . . recycling of paper requires *less than one-third* of the fossil fuel energy needed to make paper from primary sources. If, as EPA's Second Report to Congress indicates, it is technically possible to recover half of the 70% of the mixed wastepaper, the recycling of this portion (13.7 million tons) plus the 11.7 million tons of the easily separable items could mean a fossil fuel energy saving equivalent to *2.4 billion gallons of gasoline per year.* This exceeds the fuel energy equivalent of 2.2 billion gallons of gasoline that could be produced annually by burning the same amount of trash paper. . . . Thus, the recycling of paper—as opposed to burning—would produce *a net energy benefit of about 200 million gallons of gasoline, enough to drive 270,000 cars 10,000 miles a year at a rate of 13.3 miles per gallon.*" (Italics supplied.)

In the metals area, the President's Committee reported, at page 7:

> " . . . recycled aluminum requires *less* than 3% of the energy needed to produce aluminum from bauxite ore. Recycled steel requires less than half the energy needed to produce steel from virgin ore. When it is assumed that about 70% of the aluminum and 90% of the steel in the 1971 National Trash Can could be recovered, these factors translate to a potential recycling energy equivalent sav-

ing of *226.5 trillion BTU's or 1.8 billion gallons of gasoline—enough to make nearly 7 million one-way car trips per year from New York to San Francisco on the basis of 13.3 miles per gallon.*" (Italics supplied.)

Considering all of these divergent factors of urgent national interest, it is hardly surprising that there has been a mounting clamor from all levels of Federal, State, and local government calling upon the Interstate Commerce Commission immediately to eliminate the outrageous disparity in freight rates for the transportation of recyclable commodities—and in each case, the Commission has been urged *not* to license any further % rate increases until the basic disparities hereinabove described have been eliminated. In its June, 1972 Report to the President, his Citizens' Advisory Committee on Environmental Quality, chaired by Laurence Rockefeller, stated, at pages 33-41:

"Solid waste problems have become staggering. There are few environmentally effective ways to handle it. In a very short time urban areas will have run out of landfill sites. . . . Large-scale, low-cost incineration which does not contribute to air pollution is not yet available. . . .

"*Freight Rates*

"Traditionally, freight rates established by the Interstate Commerce Commission (ICC) for the most part discourage recycling. . . . (T)hey work against recovery of solid waste. . . .

". . . In our 1971 Report, the Committee recommended that ICC initiate comprehensive remedial action as soon as possible. We urge prompt further action."

Similarly, in its March, 1973 report entitled "Cities and the Nation's Disposal Crisis," the U.S. Conference of Mayors states (at page 1-21):

> "The disposal of wastes and the conservation of resources are two of the greatest problems to be understood and solved by this nation in the latter third of the century. . . .
>
> "Recycling and resource recovery as a solution is potentially the most environmentally cost effective and responsible approach. . . .
>
> *"Discriminatory freight rates are . . . contributing to a disadvantaged marketing position for recycled solid wastes. . . . Before secondary materials handlers can buy and sell recycled municipal wastes in a competitive market and before cities can attempt rail haul of wastes to distant sites for major land reclamation efforts, rate adjustments must be made. Since regulatory rates of the Interstate Commerce Commission have exacerbated the unfavorable economics of waste transport, federal action is required."*

An almost identical position was expressed by The Council of State Governments in its April 5, 1973 Report entitled "The States' Roles In Solid Waste Management," at pages 41-44, where it is stated:

> *"Freight Rates*
>
> "A substantial difference in freight rates charged by rail carriers exists between virgin raw materials and recycled materials. . . . Therefore, freight rates established by the Interstate Commerce Commission should be set in a manner that does not give an advantage to either type of material through set tariff charges."

In June, 1973, The National Commission on Materials Policy, established by Congress and appointed by

the President under Title II of the Resource Recovery Act of 1970, P.L. 91-512, issued its final report to the President and the Congress, in which it too concluded, at pages 4D17, 18:

> "Rail freight rates are an important factor in the economics of recycling. Transportation costs are a large percentage of the total cost of using some secondary materials. Often they determine whether recycling can be profitable. Certain railroad freight rates appear to discriminate against secondary materials in favor of virgin materials. . . .
>
> "Cost data available . . . indicate obvious discrimination against scrap. *Two different studies, one published by the ICC and the other by the Department of Transportation, show that shippers of scrap materials pay freight rates that more than cover the full costs of transportation service received. Shippers of virgin materials often do not.*
>
> *"We recommend that . . . the Federal Government take the necessary steps to correct the existing freight rate differentials between secondary and primary materials."*

More particularly, in *Ex Parte 281*, the case now before this Court, the President's Council on Environmental Quality, the Environmental Protection Agency, the Departments of Commerce and Interior and the General Services Administration all appeared to urge the Interstate Commerce Commission not to grant any further % increases in the existing rates for recyclable commodities until the Commission first eliminates the basic disparities in rates for competing virgin and recyclable materials. Indeed, these agencies and appellee NARI have been appearing in various ICC *Ex Parte* rate increase proceedings since 1968 to assert

that same position, but the Commission repeatedly turned a deaf ear and continued, as hereinabove demonstrated, to raise the rates on recyclables in such a manner that the net disparities in rates for competing virgin and recyclable commodities have automatically been exacerbated and expanded beyond the limits of reasonable explanation or understanding.

In 1969, while the Commission was proceeding in the manner just described, Congress passed the National Environmental Policy Act (42 U.S.C. § 4321 et seq.). That statute states, at 42 U.S.C. § 4331(b):

> "(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may— . . . .
>
> (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources."

Section 102 of NEPA (42 U.S.C. § 4332) thereupon provides:

> "The Congress authorizes and directs that, to the fullest extent possible:
>
> "(1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and
>
> "(2) all agencies of the Federal Government shall— . . .
>
> "(C) include in every recommendation or report on . . . major Federal actions sig-

nificantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse, environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

"Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to the environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public . . . and shall accompany the proposal through the existing agency review processes."

Accordingly, when the railroads filed an application in late 1971 in *Ex Parte 281—Increased Freight Rates and Charges, 1972* requesting permission to add another 2.5% surcharge to the existing freight rates for recyclable commodities, the original plaintiffs in

this case (S.C.R.A.P.) demanded that the Commission fully comply with the mandates of the new statute NEPA before any definitive action was taken on the railroads' latest % rate increase proposal. The Commission, however, in line with the myopic attitude toward environmental issues it had repeatedly exhibited prior to the enactment of NEPA, failed to prepare any *draft* or *final* Environmental Impact Statement as required by Section 102(2)(C)(2), and on February 1, 1972, it issued a blunt order approving the proposed 2.5% surcharge, in which it simply concluded (See 346 F. Supp. 193):

> "... the involved general increase will have *no* significant adverse effect on ... the quality of the human environment within the meaning of the Environmental Policy Act of 1949."

The railroads thereafter filed a further request in *Ex Parte 281* for another permanent % rate increase of 4.1%, such increase to become effective no earlier than May 1, 1972. In the meantime, S.C.R.A.P. and others were engaged in negotiations with the Commission in an effort to secure compliance with NEPA. On February 3, 1972, S.C.R.A.P. and ICC entered into a "Memorandum of Understanding" whereby S.C.R.A.P. agreed *not* to seek an injunction against the Commission's February 1 order in exchange for ICC's *promise* to *"issue a draft environmental statement in accordance with the requirements of NEPA and ... otherwise to comply with the requirements of the Act in Ex Parte 281."* (See 346 F. Supp. 193.)

In response to this pressure from S.C.R.A.P. and other appellees in this case, the Commission did issue a six-page document called a "Draft Environmental

Impact Statement" on March 6, 1972. The Nature of this draft statement, upon which the Commission *now* relies so heavily in the Government's brief before this Court, was described by the district court, as follows in its July 10, 1972 decision in this case (See 346 F. Supp. 193, 194):

> "The Commission has never adequately explained why it bothered to prepare a draft statement premised on facts it knew to be *false,* and the reason why the ICC finds itself with the resources necessary to prepare draft statements on *false hypotheses* while it is assertedly without resources to prepare impact statements as required by NEPA based on *real facts* remains one of the enduring mysteries of this case."

In any event, the extremely brief draft statement prepared by the Commission in March, 1972 aimlessly concluded (346 F. Supp. 194):

> ". . . it is impossible at this point in the investigation to assess with any certainty the environmental impact of assessment of, or failure to assess, a surcharge on various recyclable commodities."

The Commission thus allowed the 2.5% surcharge to remain in effect *allegedly without any knowledge of the impact that action might have on the recyclables involved,* but it did solemnly promise the district court a detailed final impact statement would be filed before a final order was issued regarding the proposed permanent rate increases [10]—*a promise it later broke, as hereinbelow set forth.*

At this point in the *Ex Parte 281* proceedings, appellee S.C.R.A.P. commenced the instant action. The various legal proceedings that subsequently ensued are

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[10] See 346 F. Supp. 194.

detailed in this Court's earlier opinion in this case reported at 412 U.S. 669 (1973). Indeed, while this case was before this Court on the earlier appeal, the Commission also promised the Chief Justice that it was developing an impact statement under NEPA, and that same would be issued before the final rate decision in *Ex Parte 281* was announced—*but the Commission thereafter proceeded likewise to ignore and violate that further undertaking to this Court* (See 371 F. Supp. 1291, 1294). In fact, *no statement* was prepared for distribution to the parties *or for consideration by the Commission before the Commission issued its final report in Ex Parte 281 on October 4, 1972, in which it, approved the additional permanent rate increases for the transportation of recyclables requested by the railroads* (See 371 F. Supp. 1294).

Once again, without the preparation of a NEPA statement, the Commission arbitrarily concluded, in its final report of October 4, 1972, that the new approved % increases on recyclables "would not significantly affect the quality of the human environment" (See 371 F. Supp. 1294). The Commission thus asserted (See 371 F. Supp. 1294)—

> "there is thus no necessity for a formal impact statement."

The Commission's failure to prepare a NEPA statement provoked vehement protestations from the President's Council on Environmental Quality, the Environmental Protection Agency, and appellees (See 371 F. Supp. 1294). CEQ, in its letter to the Commission, felt that the Commission's action was totally "unresponsive to the language of our NEPA guidelines" (See 371 F. Supp. 1294, ftn. 8).

Appellee SCRAP thereupon filed a motion for injunctive relief against the Commission. On the same day, November 7, 1972, the Commission suddenly shifted its position, and suspended until June, 1973, the *already-approved* rate increases on recyclables (See 371 F. Supp. 1294). The Commission thereupon announced that it intended to conduct a *post-mortem* proceeding for the "limited purpose of further evaluating . . . the environmental effects of increased railroad freight rates and charges on . . . commodities being transported for the purpose of recycling" (See 371 F. Supp. 1294).

On March 5, 1973, 5 months after the Commission issued its final report of October 4, 1972 approving the new rate increase on recyclables, the Commission finally issued its *post-mortem* draft environmental impact statement now before the Court in this case.

Although numerous Executive agencies and departments, including EPA, CEQ, GSA, and the Departments of Commerce and Interior, filed extensive comments that were highly critical of the Commission's draft statement and the arbitrary conclusions therein contained, the Commission, on May 7, 1973, 7 months after it issued its final report of October 4, 1972 approving the new rate increase for recyclables, issued another *post-mortem* order which adopted the draft impact statement theretofore issued without substantial change (371 F. Supp. 1295).

Appellees thereupon filed motions for summary judgment in the pending court proceedings, which the district court granted on February 19, 1974. The court vacated the Commission's *post-mortem* order of May, 1973 which put the previously-approved

rate increases into effect, and it remanded the case to the Commission *"for fulfillment of its NEPA obligations"*. The district court then proceeded to rule (371 F. Supp. 1293):

> "However, because of our uncertainty concerning the meaning of the Supreme Court's decision last term in *Atchison, Topeka & Santa Fe R. Co.* v. *Wichita Board of Trade,* 412 U.S. 800 (1973), we refrain from issuing an injunction restraining the railroads from collecting the increased rates pending the Commission's reconsideration."

Appellant railroads and the Government appealed. Injunctive relief having been completely denied, however, shippers of recyclable commodities have been forced to pay another $8 to 10 million a year since June, 1973 in new, arbitrary rate increases while this case has proceeded through the courts.

ARGUMENT

I.

This Court Lacks Jurisdiction Over Appellants' Direct Appeals Under 28 U.S.C. § 1253. The Appeals Should Therefore Be Dismissed.

Both Government appellants and railroad appellants rely exclusively on 28 U.S.C. § 1253 to support their direct appeals to this Court from the district court's judgment of February 19, 1974.[11] But, 28 U.S.C. § 1253 allows direct appeals to this Court *only* from judgments *"granting or denying . . . an interlocutory or permanent injunction"*.

These two appeals, however, are *not* appeals *"from an order granting or denying . . . an . . . injunction"*.

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[11] See Government's brief, pg. 2; railroads' brief, pg. 2.

While the district court did deny an injunction which had been sought by appellees (371 F. Supp. 1307-10), *appellees have not perfected appeals from that denial.*

Appellants, on the other hand, having clearly prevailed on the injunction issue below so that the railroads are still collecting the new rate increase of $10 million a year authorized by the Commission, have no standing to appeal from that massive victory (*Public Service Commission of Missouri* v. *Brashear Freight Lines, Inc.*, 306 U.S. 204, 59 S. Ct. 480, 83 L.Ed. 608 (1939); *Gunn* v. *University Committee To End The War*, 399 U.S. 383, 391, 90 S. Ct. 2013 (1970); *Rockefeller* v. *Catholic Medical Center*, 397 U.S. 820, 90 S. Ct. 1517, 25 L. Ed. 2d 806 (1970). In this case, the district court expressly ruled (371 F. Supp. 1291, 1293):

> ". . . (W)e refrain from issuing an injunction restraining the railroads from collecting the increased rates pending the Commission's reconsideration."

Patently, therefore, both direct appeals to this Court must be dismissed for lack of jurisdiction under 28 U.S.C. § 1253 (*Public Service Commission* v. *Brashear Freight Lines, supra; Hutcherson* v. *Lehtin*, 399 U.S. 522, 90 S. Ct. 2238 (1969); *Mitchell* v. *Donovan*, 398 U.S. 427, 90 S. Ct. 1763, 26 L. Ed. 2d 378 (1970).

The two cases upon which appellants rely to support their jurisdictional claims are plainly inapposite because, contrary to the situation here, *both* involved appeals from orders *granting or denying an injunction. Baltimore & O. R.R.* v. *U.S.*, 386 U.S. 372 (1967) involved an appeal by losing parties who had sought an injunction which was denied by the court below. *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742

(1972), in turn, involved two cases, one in which an appealing party requested injunctive relief that was denied, and the other in which the Interstate Commerce Commission opposed an injunction that had been granted by the district court.

Appellants have continuously contended that cases involving ICC actions should be placed in some sort of "special category", so that direct appeals to this Court should be allowed under 28 U.S.C. § 1253 even in cases where no injunctive relief is present. The short answer to that claim is found in the recent Report of the Study Group on the Caseload of the Supreme Court, which stated at 57 F.R.D. 573, 597 (1972):

> "Since many ICC cases are not of sufficient importance to require review by the Supreme Court, it is clear that the unique treatment of ICC orders is a burden on the Supreme Court that can no longer be justified."

Here, therefore, the direct appeals, which have no foundation whatsoever under 28 U.S.C. § 1253, should plainly be dismissed.

II.

The District Court Clearly Had Jurisdiction To Determine Whether the Commission Had Complied With the National Environmental Policy Act and To Grant Appropriate Relief When It Found the Commission Had Not.

Railroad appellants speciously argue that the district court lacked jurisdiction to determine whether the Interstate Commerce Commission properly complied with NEPA in *Ex Parte 281*. Government appellants seemingly do *not* join in that contention.

In any event, it is perfectly clear that the district court did possess the necessary jurisdiction. Indeed,

when this case was last here in 1973, this Court seemingly readily agreed that (93 S. Ct. 2420)—

> ". . . there is general judicial power to determine if an agency has complied with NEPA, and to grant equitable relief if it has not."

At that time, this Court appeared to cite with approval the earlier holdings of the Circuit Court of Appeals for the District of Columbia in *Calvert Cliffs' Coordinating Committee* v. *United States Atomic Energy Commission*, 146 U.S. App. D.C. 33, 449 F.2d 1109 and *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, 149 U.S. App. D.C. 380, 463 F.2d 783, wherein it was ruled that district courts have full jurisdiction to determine if federal agencies have complied with NEPA, and to grant effective relief when such compliance was either lacking or inadequate. In this regard, this Court stated, at 93 S. Ct. 2420:

> "Calvert Cliffs' held that a federal court had power to review rules promulgated by the Atomic Energy Commission, and there the court ordered further consideration of the rules on the ground there had not been compliance with NEPA. In *Committee for Nuclear Responsibility* it was held that federal courts had jurisdiction to consider whether an executive decision to conduct a nuclear test had satisfied the procedural requirements of NEPA . . ."

Moreover, there can be no question about the statutory jurisdiction of the district court to review orders of the Interstate Commerce Commission. 28 U.S.C. 1336 states:

> "Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

Appellants, of course, have pointed to *no* Act of Congress which deprived the district court of jurisdiction in cases of this kind. On the contrary, through the National Environmental Policy Act, Congress has actually provided an additional, separate basis for such jurisdiction over cases of this nature (*Calvert Cliffs', supra; Committee for Nuclear Responsibility, supra; City of New York* v. *United States,* E.D. N.Y., 337 F. Supp. 150).

For these reasons, therefore, cases such as *Algoma Coal & Coke Co* v. *United States,* D.C. E.D. Va., 1935, 11 F. Supp. 487, *Koppers Co.* v. *United States,* D.C. W.D., Pa. 1955, 132 F. Supp. 159, *Alabama Power Co.* v. *United States,* D.C. D.C. 1969, 316 F. Supp. 337, affd. by divided court, 400 U.S. 73, and *Electronic Industries Assn.* v. *United States,* D.C. D.C. 1970, 310 F. Supp. 1286, affd. *per curiam,* 401 U.S. 967, upon which the railroads rely so heavily, are totally inapposite. None of those cases involved NEPA, or a complaint that the Commission had completely failed to comply with a *separate* federal statute (NEPA) in its proceedings under Section 15(7) of the Interstate Commerce Act.

III.

The Commission's Post-Mortem Environmental Impact Statement, Drafted for the First Time Five Months After the Commission's Final Report and Order of October 4, 1972 and Thereafter Issued in Final Form Seven Months After the Commission's Said Final Report and Order, Is Totally in Violation of NEPA and Is Thus Null and Void.

On October 4, 1972, after the conclusion of statutory hearings under the Interstate Commerce Act on April 20, 1972, the Commission issued its final statutory

report and order in *Ex Parte 281, Increased Freight Rates and Charges,* 1972, 341 I.C.C. 288. In that final report, the Commission stated (See 341 I.C.C. 314):

> "Inasmuch as we conclude that our actions herein will neither actually nor potentially significantly affect the quality of the human environment, we have not included in our report an extensive formal impact statement."

On November 7, 1972, after plaintiff S.C.R.A.P. moved for further injunctive relief in this action to prevent the rate increases thus authorized by the Commission from going into effect, the Commission suddenly reopened Ex Parte 281 to "evaluate the environmental effects of (these) increased rates and charges on the movements of commodities being transported for the purposes of recycling" (App. 91). No further hearings were thereafter held by the Commission. On March 5, 1973, approximately *five months after* the Commission issued its report and order of October 4, 1972 licensing permanent 1972 increases in rates for recyclables, the Commission finally issued a "draft impact statement." That *"post-mortem"* draft statement simply concluded (App. 92, 93):

> ". . . the selective freight rate increases (already) approved in this proceeding as to commodities moving for the purposes of recycling would not have a significant adverse impact upon the equality of the human environment. It was found that any environmental costs which may result from that action would be outweighed by the economic benefits derived by the railroads . . ."

Thereafter, on May 2, 1973, approximately *seven months after* the Commission's rate-increase report and order of October 4, 1972, the Commission prepared

and issued a Final Environmental Impact Statement, which the Commission itself described as follows (App. 89):

> "This report represents, in accordance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, our final statement as to the environmental effects of these increases in the railroad freight rates and charges on movements of commodities being transported for the purposes of recycling *found in our prior report and order (341 I.C.C. 288) to be just, reasonable, and otherwise lawful.*"

Once again, the commission concluded, in *"post-mortem"* fashion long after the issuance of its final report and order of October 4, 1972 (App. 236):

> "In conclusion, we do not believe that the action we take in this proceeding will have a significant adverse impact upon the quality of our human environment. Had we found, however, that our action would have some adverse effects upon the environment, it would not preclude our granting the relief sought by the respondent (railroads) to the extent permitted in this decision."

Based on this record, we respectfully submit that the Commission's said Environmental Impact Statement, drafted for the first time *five full months after the Commission's rate-increase report and order of October 4, 1972* and thereafter released in final form *seven full months after the said report and order,* was totally violative of NEPA and was thus null and void *ab initio* (*Calvert Cliffs Coordinating Committee et al* v. *United States Atomic Energy Commission,* 146 U.S. App. D.C. 33, 449 F.2d 1109 (1971); *Greene County Planning Board* v. *Federal Power Commission,* CCA

2, 1972, 455 F.2d 412, cert. denied, 93 S. Ct. 56 (1972); *Harlem Valley Transportation Association et al* v. *Stafford, Chairman, Interstate Commerce Commission,* CCA 2, 1974, 500 F.2d 328).

The rule to be applied here was succinctly summarized in a recent article entitled *"Mandate of the National Environmental Policy Act: The Preparation of Environmental Impact Statements"*, written by an attorney from the Department of Justice and printed in The Journal of the Bar Association of the District of Columbia, Vol. 41, No. 1, January-June, 1974 issue, at page 30:

> *"Timing and Responsibility For The Preparation of Environmental Impact Statements*
>
> *"The time to prepare the statement*—NEPA states in Section 102(2)(c) that the environmental impact statement and the comments received shall accompany the proposal through 'the existing agency review processes.' The CEQ Guidelines (38 Fed. Reg. 20552, Sect. 1500.7(a)) state that 'draft statements on administrative actions should be prepared and circulated for comment *prior* to the *first significant point of decision* in the agency review process.' For the analysis presented in an environmental impact statement to be fully integrated into agency decision making, the NEPA process should be well underway *prior to the rendering of firm decisions by the agencies.*"
>
> (Italics supplied)

In *Greene County Planning Board* v. *Federal Power Commission, supra,* the Federal Power Commission argued it had no obligation to prepare an Environmental Impact Statement under NEPA *"until it files its final decision"* (See 455 F.2d 418, 419). The Second Circuit rejected *even* that contention, holding that

NEPA contains *a Congressional mandate to regulatory agencies such as FPC and ICC which requires that they carefully "consider environmental values 'at every distinctive and comprehensive state of the [agency's] process;' "* and *that they issue their own draft environmental impact statement in each case "prior to any formal hearings"* (See 455 F.2d 412, 419-20).

The Second Circuit meticulously explained in *Greene County* that "NEPA went far beyond the requirement that the agency *merely consider* environmental factors and include those factors in the record subject to review by the courts" (See 455 F.2d 412). Under NEPA, the court wrote, agencies such as FPC and ICC have the *"nondelegable responsibility" to prepare detailed environmental statements at the earliest possible stage of every environmentally-charged agency proceeding, and to consider the environmental values thus involved "at every distinctive and comprehensive stage of the agency's process"* (See 455 F.2d 420). In fact, the Second Circuit, in *Greene County* heavily relied on the prior decision of the District of Columbia Circuit in *Calvert Cliffs' Coordinating Committee* v. *Atomic Energy Commission, supra,* wherein it was stated, at pages 1117, 1118:

> "... NEPA was meant to do more than regulate the flow of papers in the federal bureaucracy. The word *"accompany"* in Section 102(2)(c) must not be read so narrowly as to make the Act ludicrous. It must, rather, be read to indicate a Congressional intent that environmental factors, as compiled in the *"detailed statement," be considered through agency review processes.*
>
> "Beyond Section 102(2)(c), NEPA requires that agencies consider the environmental impact of their actions "to the fullest extent possible."

> The Act is addressed to agencies as a whole, not only to their professional staffs. Compliance to the *"fullest"* possible extent would seem *to demand that environmental issues be considered at every important stage in the decision making process concerning a particular action—at every stage where an overall balancing of environmental factors is appropriate and where alterations might be made in the proposed action to minimize environmental costs."*
>
> (Italics supplied)

There can be no doubt, we submit, about the complete correctness of the Second Circuit's ruling in *Greene County* and the D. C. Circuit's holding in *Calvert Cliffs.* Both decisions do no more than fully sustain the statutory requirement of Section 102(2)(c) of NEPA (42 U.S.C. § 4322(2)(c)) which states:

> "Copies of such [environmental impact] statement and the comments and views of the appropriate Federal, State, and local agencies . . . *shall accompany the proposal through the existing agency review processes."*
>
> (Italics supplied)

The briefs filed by the railroads and the Government impliedly concede the correctness of this rule which has become so firmly established in the various circuits. However, they now belatedly contend that somehow the Commission, which arbitrarily failed and refused to have the necessary impact statement available at every meaningful stage of the agency proceeding, somehow nevertheless complied with NEPA by simply continuing to rule throughout that indeed no statement was required because its actions allegedly would have no significant impact on the environment. The utter fallaciousness of that position, however, is laid bare

by the Commission's own belated admission that it had not properly complied with NEPA *prior* to the rendition of its final decision of October 4, 1972, *and that accordingly it would have to spend seven months in the preparation of a post-mortem impact statement in an attempt to rationalize the final decision it had already issued.*

In conclusion, therefore, we urge the Court to hold—

(i) that the Commission violated NEPA when it failed to prepare or issue any impact statement to support the final decision it released on October 4, 1972 in Ex Parte 281, in which it approved another cumulative % rate increase for the transportation of recyclables, and that accordingly, the rate increase so licensed was unlawful; and

(ii) that the Commission further violated NEPA when it prepared for the first time, five months after its final order of October 4, 1972, a *post-mortem* NEPA statement, the only purpose of which was to try to rationalize the new rate increase on recyclables it had already approved in final form many months before.

IV.

The Commission's Final Environmental Impact Statement, Issued After the Commission's Order of Investigation of November 7, 1972, Without a Hearing and Without the Right of Confrontation, Is Unconstitutional and Violative of the Interstate Commerce Act, the Administrative Procedures Act and the CEQ Guidelines Under the National Environmental Policy Act.

On October 4, 1972, the Commission issued its final report and order in Ex Parte 281 without preparing or filing any environmental impact statement pursuant

to NEPA. Petitions vehemently protesting the Commission's conduct were thereupon filed by CEQ, EPA, appellees and other parties. On November 7, 1972, therefore, the Commission issued an Order of Investigation in Ex Parte 281, which read in part as follows:

> "*It is ordered,* That the above-entitled proceeding be, and it is hereby, reopened for the limited purpose of further evaluating, in accordance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), the environmental effects of increased railroad freight rates and charges on the movements of commodities being transported for the purpose of recycling. . . .
>
> "*It is further ordered,* That in view of the foregoing actions, and because there is reason to believe that the tariff schedules identified in the appendix to this order may, if permitted to become effective, result in . . . rates and charges, rules, regulations, or practices which would not be in conformity with the report in *Ex Parte No. 281, Increased Freight Rates and Charges, 1972,* 341 I.C.C. 288, decided September 27, 1972, as modified by this order, *an investigation be, and it is hereby, instituted into and concerning the rates, charges, and regulations contained in said schedules, with a view to making such findings and orders as the facts and circumstances shall warrant. . . .*
>
> "*It is further ordered, That the investigation in this proceeding shall not be confined to the matters and issues hereinbefore stated as the reason for instituting this investigation, but may include all matters and issues with respect to the lawfulness of the said schedules under the Interstate Commerce Act. . . .*"
>
> (Italics supplied)

Plaintiffs and intervenor-plaintiffs thereupon requested that hearings be scheduled with reference to any and all matters within the scope of said investigation (App. 93). They also asserted the right to confront and cross-examine witnesses and Commission personnel who might participate in the Commission's fact-finding mission, especially those upon whose expertise the Commission would rely in the preparation of the belated environmental impact statement (App. 93). The Commission flatly refused to schedule any hearings, and it rejected the requests for confrontation and cross-examination, stating (App. 102):

> "We see no benefit to be derived by allowing further hearings in this proceeding. . . . The present environmental record has been developed in substantial part *by our own independent efforts* and there appears no reasonable basis for now concluding that the parties can make any further rational contribution to that record. . . .
>
> "The record in this proceeding is complete and further public procedures herein would be impracticable, unnecessary, and contrary to the public interest."
>
> (Italics supplied)

It is perfectly clear, of course, that the Commission's position in this regard was totally arbitrary and capricious. It had nowhere theretofore disclosed the so-called "environmental record" allegedly produced as a result of "its own independent efforts"—certainly, it had never confronted the parties with any such record for the purpose of cross-examination, refutation or rebuttal. It had not yet issued the draft environmental impact statement, later released in

March, 1973, and the Commission had theretofore steadfastly foreclosed presentation of the true environmental facts by simply concluding unilaterally that increased freights rates do not adversely affect either recycling or the human environment. Indeed, even in its final environmental impact statement of May 1, 1973, the Commission once again failed to make any findings regarding the last-mentioned crucial threshhold environmental issue, stating (App. 102):

> ". . . Chairman Russell B. Train of CEQ . . . has conveyed to us his belief that 'several rail haul cost biases currently exist', and certain of the parties herein aver that discriminatory railroad rates and charges impede the movement of waste materials and favor the transportation of primary materials with 'obvious' adverse consequences to the environment.
>
> "As recently as the last general rate proceeding, we pointed out that such a case does not provide an appropriate vehicle for examining these issues (*Increased Freight Rates, 1970 and 1971,* 339 I.C.C. 125, 189 (1971)). Thus, we do not attempt to determine whether the particular rates which result from the increases are maximum reasonable rates. . . ."

Appellees respectfully submit, therefore, that the Commission's refusal to schedule hearings with reference to all matters covered by its Order of Investigation of November 7, 1972 in Ex Parte 281 violated the parties' rights under the Due Process Clause of the Fifth Amendment and under the Interstate Commerce Act, the Administrative Procedure Act and the applicable Guidelines issued by CEQ under NEPA.

In *Goldberg* v. *Kelly,* 397 U.S. 254, 90 S.Ct. 1011 (1970), this Court extended *"rudimentary due process"* to cases involving the termination of federally-assisted welfare benefits on the basis of the following general rules which, we submit, should be equally applied in a case of this nature, where a federal agency is engaged in the licensing of millions of dollars in increased freight rates on recyclable commodities (at 397 U.S. 267-271):

> " 'The fundamental requisite of due process of law is the opportunity to be heard.' *Grannis* v. *Ordean,* 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). 'The hearing must be at a meaningful time and in a meaningful manner.' *Armstrong* v. *Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L. Ed. 2d 62 (1965). . . .
>
> "The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard. It is not enough that a welfare recipient may present his position in writing. . . . Written submissions are an unrealistic option. . . . Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decisionmaker appears to regard as important. . . .
>
> *"In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. . . .*
>
> "Finally, the decisionmaker's conclusion . . . must rest *solely* on the legal rules *and evidence adduced at the hearing. . . .*" (Italics supplied)

As early as 1913, of course, this Court applied essentially the same rules of due process of law to rate

proceedings before the Interstate Commerce Commission, and that 1913 decision was relied on by Mr. Justice Brennan in the majority 1970 decision in *Goldberg* v. *Kelly, supra.* In that case, *Interstate Commerce Commission* v. *Louisville & Nashville Railroad,* 227 U.S. 88 (1913), the Commission contended that its decisions in rate cases were absolutely conclusive and could not be set aside even where the Commission's findings were wholly without substantial evidence to support them (See 227 U.S. 91). This Court unanimously rejected the Commission's position, stating, at pages 91, 92:

> "A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.
>
> "In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, *are void if a hearing was denied; if that granted was inadequate or manifestly unfair;* if the finding was contrary to the 'indisputable character of the evidence' . . . . "
>
> " . . . A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law and must, in the language of the statute 'be set aside by a court of competent jurisdiction' . . . . " (Italics supplied)

In *Louisville & Nashville R.R., supra,* this Court, in a further holding particularly relevant to the case at bar, went on to state, at pages 93, 94:

> "The Government further insists that the Commerce Act . . . requires the Commission to obtain information necessary to enable it to perform the duties and carry out the objects for which it was created, and having been given legislative power to make rates it can act, as could Congress, on such information, and therefore its findings must be presumed to have been supported by such information, *even though not formally proved at a hearing. But such a construction would nullify the right to a hearing—for manifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain or refute. . . . All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal.* In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient information to support the finding." (Italics supplied)

Clearly, therefore, these long standing rules of constitutional law, directly applicable to rate proceedings before the Commission, explain why the Second Circuit, in *Greene County Planning Board* v. *Federal Power Commission, supra,* ruled, in 1972, that federal regulatory agencies such as FPC and ICC *must issue their draft environmental impact statements under*

NEPA "prior to any formal hearings" (See 455 F.2d 419).

These same rules of constitutional law directly applicable to proceedings before the Commission also undoubtedly explain why the Interstate Commerce Commission itself felt constrained to schedule *"further hearings"* in *City of New York* v. *United States,* U.S.D.C. E.D.N.Y., 1972, 344 F. Supp. 929, when the district court in New York rejected the Commission's earlier order approving the abandonment of railroad facilities pending full compliance by the Commission with NEPA. Under obvious scrutiny of the district court in New York, the Commission let all interested parties participate fully in these "further hearings" which dealt with the "environmental questions" there raised under NEPA (See 344 F. Supp. 931). Totally unlike its arbitrary, capricious hearing denial in the case at bar, the Commission proceeded as follows in *City of New York, supra,* (See 344 F. Supp. 936-939):

> "Together with its order directing *further hearings* following remand, the Commission issued a draft environmental impact statement to provide a basis for exploration of the Railroad's abandonment at the hearing. . . .
>
> "Although not compelled to do so by the terms of our remand, see 337 F. Supp. at 164, the Commission held five days of hearings, a substantial portion of which were focused on the environmental questions. All parties were given full opportunity to present evidence on the environmental aspects of the case. . . .
>
> "This procedure was consonant with that mandated in *Greene County Planning Bd.* v. *FPC, supra,* 455 F.2d at 422, *where the Second Circuit*

held that the FPC violated "NEPA by conducting hearings prior to preparation by its staff of its own impact statemnt." (Italics supplied)

Clearly, therefore, the Commission's refusal to hold hearings in the case at bar after issuance of its Order of Investigation on November 7, 1972 violated appellees' rights under the Fifth Amendment; and the Commission's failure to hold any hearings whatsoever after issuance of its draft environmental impact statement on March 5, 1973, violated NEPA, as construed by the Second Circuit in *Greene County, supra*—a case wherein this Court denied certiorari.

Moreover, the Commission's procedures in this case were simultaneously violative of the Interstate Commerce Act (Title 49 U.S.C. § 15(7)), the Administrative Procedure Act (Title 5 U.S.C. §§ 554-556), and the Guidelines issued by the President's Council on Environmental Quality pursuant to NEPA (40 C.F.R. § 1500.7(d), effective 1/28/73, 40 C.F.R. 1500.14). The Commerce Act (49 U.S.C. § 15(7)) plainly requires a *"full hearing"* in all rate cases of this nature after the Commission decides to investigate "the lawfulness of such rate." Indeed, in *Atchison, Topeka & Santa Fe Railway Co.* v. *United States,* 284 U.S. 248, 262 (1932), a case like the instant action involving a reopened rate proceeding, this Court ruled that the Commerce Act requires the Commission to hold a full, fair hearing, even in *reopened rate proceedings* under the Act, whenever such a hearing "is required by the essential demands of justice." The Court admonished the Commission (284 U.S. 262):

> "In the discharge of its duty, a fair hearing is a fundamental requirement. . . . In the instant

> proceeding, the [original] hearing accorded related to conditions which had been radically changed, and a hearing [in the reopened proceeding] . . . would have permitted the presentation of evidence relating to existing conditions, was denied. *We think this action was not within the permitted range of the Commission's discretion, but was a denial of rights.* The order of the Commission which was thus made effective, and the ensuing supplemental order, cannot be sustained."

In the case at bar, the Commission's November 7, 1972 Order of Investigation reopened Ex Parte 281 for

> "(i) the purpose of re-evaluating the environmental effects under NEPA of the increased freight rates ordered by the Commission's report of September 27, 1972, and
>
> (ii) the purpose of investigating any and all other matters and issues with respect to the *lawfulness* of the . . . schedules under the Interstate Commerce Act."

Ergo, appellees were patently entitled to the hearing they demanded in the said reopened investigation under *both* NEPA *and* the Commerce Act itself, and the Commission violated the latter as well as the former when it flatly denied that right.

The same conclusion is equally compelling under the Administrative Procedure Act (5 U.S.C. §§ 554-556) and the CEQ Guidelines under NEPA. Under 5 U.S.C. § 554(a), (c) hearings must be granted, in accordance with 5 U.S.C. §§ 556 and 557, "in every case of adjudication required by statute to be determined on the record after opportunity for agency hearing." Here, a hearing is required by the Commerce Act, so 5 U.S.C.

554-556 are entirely apposite to the case at bar. Under 5 U.S.C. § 556, it is provided:

> "A party is entitled to present his case . . . by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."

Finally, under 5 U.S.C. § 556(e), it is provided:

> "The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the *exclusive record for decision . . . When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.*" (Italics supplied)

All of these rights and protections were denied appellees in this case when the Commission arbitrarily and unlawfully refused to conduct any hearings after it reopened Ex Parte 281 in November, 1972 and scheduled a further investigation, under both the Commerce Act and NEPA. In *Northeast Airlines, Inc.* v. *Civil Aeronautics Board,* CCA 5, 1965, 345 F.2d 484, cert. denied 382 U.S. 845, 86 S.Ct. 41 (1966), a case wherein the CAB reopened a case theretofore heard by the Board, CAB elected to rely exclusively on its own data and statistics and it denied Northeast Airlines' demand for a hearing under the Administrative Procedure Act. The Fifth Circuit rejected the Board's procedure, stating at 345 F.2d 487:

> "Having opened the door to new data, the Board was obliged to take a full look. No useful purpose would be served in our discussing each aspect, but we suggest that fairness may require that

> Northeast's opportunity to rebut and explain what the Board has already noticed should extend to as recent developments as may be available at the date of the hearing. . . . "

In conclusion, the Court's attention is directed to the Guidelines under NEPA published by CEQ and made effective and applicable "to all draft and final impact statements filed with the Council after January 28, 1973." These guidelines state, at 40 C.F.R. 1500.7(d):

> "Agency procedures developed pursuant to § 1500.3(a) of these guidelines should indicate as explicitly as possible those types of agency decisions or actions which utilize *hearings* as part of the normal agency review process, either as a result of statutory requirement or agency practice. *To the fullest extent possible, all such hearings shall include consideration of the environmental aspects of the proposed action.* Agency procedures shall also specifically include provision for public hearings on major actions with environmental impact. . . . In deciding whether a public hearing is appropriate, an agency should consider . . . the degree of interest in the proposal, as evidenced by requests from the public and from Federal . . . authorities that a hearing be held . . . *Agencies should make any draft environmental statements to be issued available to the public at least fifteen (15) days prior to the time of such hearings.*" (Italics added)

A fortiori, the Commission's final environmental impact statement of May 2, 1973 in Ex Parte 281 is unconstitutional, completely unlawful and it must therefore be rejected by this Court (See *Atchison, Topeka & Santa Fe Railway Co.* v. *Wichita Board of Trade,* 93 S.Ct. 2367, 2374 wherein this Court recently reaffirmed the rule that decisions of the Commission in

rate cases may be rejected by the courts "upon a showing that they . . . were made without a hearing, exceed constitutional limits, or for some reason amount to abuse of power").

V.

The Commission Has Constantly Exhibited Hostility and Contempt for the Requirements of NEPA, Both in This Case and in Other Statutory Proceedings. Accordingly, the District Court Properly Exercised Its Judicial Power to Review Not Only the Form of the Commission's Belated Asserted Compliance With NEPA in This Case, but the Substance as Well.

The Commission, over the years since 1970 when NEPA became effective, has exhibited almost complete disdain and contempt for the requirements of that federal statute. As early as 1971, it sought to intervene in *Greene County Board* v. *Federal Power Commission, supra,* in support of the Federal Power Commission's attempt to avoid regulatory agency compliance with NEPA. ICC's intervention was rejected; the Second Circuit overruled FPC's position, and this Court denied certiorari.

In *City of New York* v. *United States, supra,* a 1972 case involving proceedings before the Commission itself, ICC directly defied NEPA and endeavored to license the abandonment of railroad facilities without the preparation of a supporting impact statement. A three-judge court in New York criticized the Commission for its "slow reaction" to NEPA, and stated the Commission is powerless to "disregard . . . the law" (337 F. Supp. 158-160). The Court remanded the case to the Commission, stating, at 337 F. Supp. 160:

> "To permit an agency to ignore its duties under NEPA with impunity because we have serious

> doubts that its ultimate decision will be affected by compliance would subvert the very purpose of the Act and encourage further administrative laxity in this area . . . . In any event, preservation of the integrity of NEPA necessitates that the Commission be required to follow the steps set forth in § 102, even if it seems likely that these steps will lead it to adhere to the present result. Thus, this proceeding must be remanded to the Commission for it to bring itself into compliance with the law."

Albeit the decision in *City of New York, supra,* was rendered on January 20, 1972, the Commission nevertheless proceeded just 12 days later (on February 1, 1972) in this case to license another increase in rates for the transportation of recyclables *without preparing any impact statement under NEPA.* The Commission instead arbitrarily continued to rely on the same type of terse, unsupported conclusion it espoused in *City of New York,* to wit, that, in its opinion, the approved new increase "would have no significant effect . . . . on the quality of the human environment within the meaning of NEPA" (See 341 I.C.C. 288, 314).

The Commission's continued defiance of the law in Ex Parte 281 thus led to the commencement of this action, and although the Commission promised both the district court and the Chief Justice of this Court that it would fully comply with all of the requirements of NEPA *before* it issued its final report in this case, the record shows that once again, the Commission rendered that report on October 4, 1972 without preparing a final impact statement under NEPA.

In the meantime, in still another case simultaneously pending in New York, the Commission, *contrary to the*

position taken by the Department of Justice in the same case, contended that it had no obligation even to prepare a NEPA impact statement until it was ready to reach its final decision in a case—i.e. ICC argued it had no duty to prepare its statement at any earlier stage of the proceedings (See *Harlem Valley Transportation Association* v. *Stafford, Chairman, ICC,* 500 F.2d 328 (1974). That contention was bluntly rejected by the courts in New York, and the Second Circuit stated:

> ". . . . (W)hile we recognize there are limits to what may reasonably be expected from an agency, we cannot excuse noncompliance with NEPA such as the ICC here seeks to justify."

Ergo, it is plain, we submit, in light of this record which demonstrates constant hostility and contempt on the part of the Commission for the requirements of NEPA, both in this case and in all others recently before the courts, that the district court clearly had the power and duty to review not only the *form* of the Commission's alleged belated compliance with NEPA in the case at bar, but the *substance* of that compliance as well.

In this regard, the courts have held that federal agencies must at least make a *good faith* effort to comply with NEPA (*Environmental Defense Fund* v. *Corps of Engineers,* E.D. Arb., 1972, 342 F. Supp. 1211, 1214). NEPA does not permit impact statements to be slanted or biased and it utterly precludes those which amount to mere *pro forma* rituals, since clearly such statements negate the requirement of good faith (*Environmental Defense Fund, Inc.* v. *Corps of Engineers, supra,* at pg. 1214; *Calvert Cliffs Coordinating Committee* v. *Atomic Energy Commission, supra,* at pgs.

1114, 1117, 1128). Indeed, when an impact statement falls into one of the last mentioned categories, it must be rejected by the courts because of NEPA's insistence "upon unbiased and open-minded evaluations in spite of the Agency's contradictory roles" (*District of Columbia* v. *Volpe,* 3 E.R.C. 1143 (D.C. Cir., 1971); *Sierra Club* v. *Froehlke,* D.C. Wis., 1972, 345 F. Supp. 440, 445).

Here, it is plain, we submit, that the *post-mortem* Environmental Impact Statement released by the Commission 7 months after the rendition of its final report in *Ex Parte 281* was *not* "a good faith effort to comply with NEPA." Rather, it was a mere *pro-forma* ritual, the sole purpose of which was to rationalize the Commission's earlier conclusion that the rates for transportation of recyclables should suffer still another % increase and that such action, blindly taken exclusively with the interests of the railroads in mind, allegedly would not (in the Commission's judgment) adversely affect the environment. Any doubt about the absolute validity of this assessment is dispelled by the following comments filed by other Federal Government agencies regarding the Commission's post-mortem production:

(i) *U.S. Department of Commerce*— " . . . the draft impact statement was written to support the *prior* conclusions of (the) Commission and *not* to inform the public" (App. 100).

(ii) *General Services Administration*— "GSA does not believe recyclables should be required to bear their full share of the carriers' revenue requirements. It suggests that where it can be determined that reduced rail freight levels might reasonably be expected to result in increased recycling of solid wastes, serious consideration should be given to the establishment of rate ceil-

ings on such traffic no lower than the compensatory level" (App. 271).

(iii) *U.S. Department of Interior*— " . . . the involved statement does not provide a careful multi-disciplinary examination of the environmental effect" (App. 274).

(iv) *Environmental Protection Agency*— "EPA has classified the draft environmental impact statement as *Category 3—Inadequate*. . . . (T)he statement does not adequately assess the environmental impact of the proposed freight rate increases on the movement of secondary materials; and . . . it does not consider in reasonable detail the range of alternatives to the proposed action" (App. 275).

(v) *President's Council on Environmental Quality*— " . . . (T)he draft statement fails to consider how freight rates affect longrun decisions on investment in scrap-intensive production facilities . . . *and it finds it difficult to believe that the economic well-being of the Nation's railroads is at stake in this proceeding.* CEQ does not understand why the Commission cannot design incentive rates for recycling."

Moreover, the record before the Court demonstrates *that two members of ICC itself* dissented from the Commission's order which approved the *post-mortem* impact statement, and *both* suggested *that a moratorium should be placed on any further rate increases for recyclables until the Commission comes to grips with the basic rate disparities which grow wider with each % increase in the rates* (App. 237, 238).

Based on this record, we respectfully submit it was absolutely incumbent upon the district court to review not only the *form,* but also the *substance* of the Commission's *post-mortem* alleged compliance with NEPA

in this case. And, upon such review in this case, we submit further that it was wholly correct and proper for the court to find—

(1) "The Commission's mode of preparation and utilization of the challenged impact statement here violated both Section 102(2)(C)'s fundamental purpose and . . . specific command" (371 F. Supp. 1299).

(2) "The Commission . . . neither intended to give nor actually gave full reconsideration to the question of the recyclable rate increase" (371 F. Supp. 1299).

(3) "[The Commission's statement] makes no attempt to integrate the considerations of national transportation policy justifying the rate increase with the environmental considerations analyzed in the impact statement" (371 F. Supp. 1299).

(4) "[The Commission] refused to hold . . . a hearing to reconsider the increase on recyclables. . . ." (371 F. Supp. 1300).

(5) ". . . a reader of the statement must be struck by the combative, defensive and advocatory language and style in which it is written" (371 F Supp. 1302).

(6) "We find the Commission's failure to alter its draft impact statement in response to *three* of the critical comments *of other federal agencies* particularly troublesome" (371 F. Supp. 1302).

(7) ". . . (T)he draft statement's . . . most fundamental and important deficiency (is) the limitation of its analysis *to the marginal impact of the most recent rate increase with no discussion of whether the underlying rate structure itself significantly affects the environment*" (371 F. Supp. 1303, 1304).

Considering the aforementioned fact that constant annual % rate increases in the last few years have seriously aggravated the *nationwide average disparities* in freight rates for the transportation of competing recyclables and virgin natural resources—to wit,

> (a) in the case of wastepaper and pulp, from 13.9¢ per cwt. in 1959 to 28¢ per cwt. in 1975 in favor of pulp, and
>
> (b) in the case of non-ferrous metal ores and scrap, from 13.3¢ per cwt. in 1959 to 24¢ per cwt. in favor of the virgin ores—

it was likewise perfectly correct and proper for the district court to hold, at 371 F. Supp. 1304:

> "We fail to understand how any consideration of the environmental impact of approving the recyclable rate increases could be full without an analysis of how the underlying rate structure itself affects the environment. *It is the underlying rate structure which the percentage increases aggravate; if this structure contributes to the degradation of our environment, then the increases would at least presumptively aggravate that contribution.* . . . Any impact on the underlying structure could be eliminated by holding down recyclable rate increases each time the railroads requested a general rate increase. The Commission's failure to hold down the rate increases on recyclables would thus have a cumulative impact on the environment."
>
> (Italics supplied.)

These findings by the court are in full accord with the position taken by 5 federal agencies in this case and by 2 of the ICC Commissioners. They are likewise fully responsive to the constant positions taken in recent years by the League of Cities-U.S. Conference of Mayors, Council of State Governments, Na-

tional Commission on Materials Policy, and the President's Citizens Advisory Committee on Environmental Quality, all of which are a matter of record in this case.

Ergo, the district court's decision, based on voluminous supporting evidence before the Court, should plainly be affirmed.

VI.

The Nation's Urgent Interests in Resource Conservation, Resource Recovery, Restriction of Unnecessary Foreign Imports of Critical Materials and Energy Conservation Will All Be Seriously Damaged If This Court Is Misled by Some of the False Assertions Presently Advanced by Appellants in This Case.

Before concluding, NARI feels constrained to direct the Court's attention to some of the inaccurate, baseless contentions advanced by appellants in this case, not only because they threaten a fair and just decision in the instant action, but also because, if believed, they could result in serious adverse impacts on our nation's vital, urgent interests in resource conservation, recycling, restriction of unnecessary foreign imports of critical raw materials and energy conservation.

(1) THE COMMISSION'S ASSERTION THAT THE BASIC RATE STRUCTURE FOR RECYCLABLE COMMODITIES IS THE SUBJECT OF INVESTIGATION IN EX PARTE 270.

Throughout its brief, the Government attempts to claim that *Ex Parte 270,* a long, malingering study ICC has been conducting off and on for the past 4 years and which will apparently continue for another 4, is the proper place for an examination of the basic rate structure for recyclables (Govt's brief, pgs. 16, 17; 41). The record before the Court, however, demonstrates that when NARI applied to Commissioner Hardin, the ICC

Commissioner-in-Charge of *Ex Parte 270* on November 7, 1973 for assurance that the basic rate structure for recyclable wastepaper, textiles and non-ferrous scrap would be included in the *Ex Parte 270* rate investigation proceedings (See *Appendix A* hereto), Commissioner Hardin refused to include those commodities in the *Ex Parte 270* investigation proceedings because allegedly the Commission's "investigative abilities are limited in terms of money and manpower." Commissioner Hardin went on to state (*Appendix B* hereto):

> "With respect to your . . . suggestion that a(n) . . . investigation be instituted with respect to non-ferrous metal scrap, wastepaper, and the virgin competitive products, . . . I am not in a position to advise . . . when and if such an investigation will be instituted. . . .
>
> "Rather than await an initiating response from the Commission, . . . I suggest that you meet with the railroad industry in order to determine whether or not it is possible to agree upon a relevant data base and limit the areas of controversy. . . ."

As of this date, the Commission has *not* embarked upon any investigation of the rate structure for these basic recyclable solid waste materials, and thus it is absolutely misleading for the Government to take the position it has regarding *Ex Parte 270* in its brief.

(2) THE GOVERNMENT'S ASSERTION THAT CONSTANT RATE INCREASES FOR RECYCLABLES ARE NECESSARY BECAUSE THE RAILROADS ARE IN DESPERATE FINANCIAL CONDITION.

The Court certainly knows that fortunately only some of the nation's railroads have been mismanaged to the point of financial embarrassment. Railroads such

as the Southern System, the Burlington Northern, the Southern Pacific, the Union Pacific, the Chessie System and others are operating with handsome profits.

Moreover, in each of the general revenue proceedings in recent years, the railroads themselves have either totally or partially exempted long lists of commodities, including some virgin commodities such as pulp which competes with waste-paper, from the requested rate increases.

The point, therefore, is that the rate increases sought on recyclables are not essential to the continued operation of the railroads, and it is exceedingly unreasonable and damaging for the railroads constantly to aggravate the existing rate disparities against recyclables by increasing the rates for those commodities, while exempting scores of other commodities for reasons known only to the railroads themselves.

Finally, the Commission itself recently received extensive evidence in *Ex Parte 310 — Nationwide Freight Rate Increases, 1975,* which demonstrates, as the Commission's records already reflected, that typically, *virgin commodities are traveling on the nation's railroads at rates far below the railroads' variable costs, while recyclable commodities are concomitantly compelled to pay rates that far exceed the railroads' costs.* How, therefore, could the Commission possibly justify any further increases in transportation rates for recyclables when virgin commodities are carried at rates substantially below the railroads' costs?

And, how can the railroads justly demand further increases for the carriage of recyclables when daily they transport long lists of other commodities at rates which do not even defray their own costs?

CONCLUSION

The two appeals should be dismissed for lack of jurisdiction. If the Court reaches the merits, the district court's judgment should be affirmed, or in the alternative, this Court should rule that the 1972 rate increases on recyclables, approved by the Commission's order issued on October 4, 1972, without the preparation of any impact statement under NEPA, are unlawful; and the Commission's *post-mortem attempt* to legalize those unlawful rate increases is unsustainable.

Respectfully submitted:

EDWARD L. MERRIGAN
Attorney for Appellees
NARI et al.
888 17th Street, N. W.
Washington, D. C. 20006

APPENDIX A

SMATHERS AND MERRIGAN
ATTORNEYS AND COUNSELLORS AT LAW
888 SEVENTEENTH STREET, N.W.
WASHINGTON, D.C. 20006

November 7, 1973

Honorable Dale W. Hardin
Commissioner
Interstate Commerce Commission
Washington, D. C. 20423

Re: Ex Parte No. 270, Investigation of Railroad Freight Rate Structure

Dear Commissioner Hardin:

Thank you for your very nice letter of October 23, 1973 and for the information furnished therewith.

Considering the serious problems confronting the Commission, the recycling industry throughout the United States and, of course, the railroads as a result of the continuing litigation in *Ex Parte No. 281—Increased Freight Rates, 1972 (S.C.R.A.P.* v. *United States,* et al), we find it exceedingly difficult to understand why your investigations announced to date do not include *non-ferrous metal scrap* and its competing virgin commodities as well as just iron ores and scrap iron and steel, and why they do not include wastepaper and competing wood pulp shipments instead of just lumber and lumber products.

While we understand the Commission's assertion that its investigative abilities are limited in terms of money and manpower, certainly these additional recyclable commodities (non-ferrous metal scrap and wastepaper) should fairly be added to and considered as part of *Ex Parte No. 270 (Sub-No. 5), Ex Parte No. 270 (Sub-No. 6),* and *Ex Parte No. 270 (Sub-No. 7),* especially in light of the long malingering litigation problem hereinabove referred to.

Accordingly, we urge you to take whatever actions are necessary—

(1) To add non-ferrous metal scrap to *Ex Parte No. 270 (Sub-No. 6)* and the competing virgin metal natural resource commodities to *Ex Parte No. 270 (Sub-No. 7)*, along with wood pulp, which is certainly one of our most important timber products, or in the alternative

(3) To commence at the earliest possible date additional *Ex Parte No. 270* investigations to cover the aforementioned recyclable commodities so heavily involved in the basic rate discrimination questions raised in *Ex Parte No. 281* and the related litigation.

Obviously, NASMI's committee is ready and anxious to meet with both you and Mr. Goodman. However, certainly the first step must be taken by the Commission, to wit, the commencement of active investigations regarding all of the important recyclable commodities—not just one of them. In fact, NASMI is principally concerned with all recyclable commodities other than scrap iron and steel—and those it represents (non-ferrous metal scrap, wastepaper, textiles, plastics) are the ones which create the biggest and most troublesome solid waste disposal problems for our federal, state and local governments. Accordingly, it is these which should clearly have some fair preference in the current freight rate investigation. Indeed, these are the recyclable commodities the Federal Maritime Commission selected for first order of investigation (see *Docket 72-35, FMC Investigation of Freight Rates Charged for Transportation of Wood Pulp and Wastepaper).*

Looking forward to your advice in this regard, I am,

Sincerely,

EDWARD L. MERRIGAN

ELM:gk
cc: Leonard S. Goodman, Esq.

APPENDIX B

INTERSTATE COMMERCE COMMISSION
WASHINGTON, D. C. 20423

November 13, 1973

Mr. Edward L. Merrigan
Counsel, National Association of
Secondary Material Industries, Inc.
Smathers and Merrigan
888 Seventeenth Street, N.W.
Washington, D. C. 20006

Dear Mr. Merrigan:

In the Coordinator's report, served October 10, 1973, *Investigation of Railroad Freight Rate Structure,* 345 I.C.C. 1, 2, after announcing that five subumbered investigations were being instituted, I stated that, "While shippers of various commodities may believe that the Coordinator should immediately institute investigations into the aspects of the railroad freight rate structure of critical concern to them, they must remember that the resources in terms of money and manpower of the railroads, the Special Projects Counsel, and the Commission are not unlimited." I therefore can understand your concern that investigations were not instituted with respect to non-ferrous metal scrap and wastepaper. Further, I appreciate your awareness that the Commission's "investigative abilities are limited in terms of money and manpower."

Although I am also well aware of the long "malingering" litigation problem surrounding the Commission's decision in Ex Parte No. 281, cited in your letter of November 7, 1973, I am unable to agree with your proposal to expand the ex parte subnumbered investigations, Sub-No. 5, Sub-No. 6, and Sub-No. 7. With respect to your alternate suggestion that a subnumbered investigation be instituted with respect to non-ferrous metal scrap, waste-paper,

and the virgin competitive products, obviously I am not in a position to advise you by letter when and if such an investigation will be instituted. You and all interested parties will be advised of developments in Ex Parte No. 270 by order, notice, or other appropriate means.

Rather than await an initiating response from the Commission, I renew my suggestion of October 23, 1973, that you meet with the Special Projects Counsel. I would suggest that you also meet with the railroad industry in order to determine whether or not it is possible to agree upon a relevant data base and limit areas of controversy. I can assure you that such efforts, if successful, will in the long run prove to be useful in the Commission's continuing study of the railroad rate structure.

For the convenience of all, I am arranging to have a copy of this letter and our previous correspondence included in the correspondence section of the basic Ex Parte No. 270 docket.

Sincerely,

/s/ DALE W. HARDIN
Dale W. Hardin
Commissioner

CC: Leonard S. Goodman

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 73-1966 and 73-1971

ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL.,
Appellants,

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), ET AL.,
Appellees.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellants,

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), ET AL.,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF FOR THE INSTITUTE OF SCRAP IRON AND STEEL, INC.

JURISDICTION

Appellees dispute the grounds on which Appellants contend that the jurisdiction of this Court may be invoked.

Appellants base the jurisdiction of this Court on 28 U.S.C. § 1253.

Appellees, however, assert that this appeal is not from the grant or denial, opposed by the appellants, of an injunction, as required under Section 1253. In actuality, the lower court vacated an order of the ICC and remanded the matter to that body. This action was termed a "declaration" by both the lower court and the government. 371 F.Supp. at 1295 (Jurisdictional Statement in 73-1971 [hereinafter Gov. J.S.] at 13a); Brief of Appellants United States and Interstate Commerce Commission [hereinafter Gov. Br.] at 12. The party which did not prevail on such a declaration is not entitled to a direct appeal to this Court. *See Mitchell* v. *Donovan,* 398 U.S. 427 at 430-31 (1970).

STATUTES INVOLVED

Appellees herein incorporate by reference the statement of Statutes Involved set forth in the brief of Appellees Students Challenging Regulatory Agency Procedures (SCRAP), Environmental Defense Fund, *et al.,* at pp. 3-4. Additionally, 28 U.S.C. § 2201 and Section 13(1) of the Interstate Commerce Act, 49 U.S.C. § 13(1), are set out in the Appendix, *infra,* p. 1a.

QUESTIONS PRESENTED

Appellees herein incorporate by reference the statement of the Questions Presented set forth in the brief of Appellees Students Challenging Regulatory Agency Procedures (SCRAP), Environmental Defense Fund, *et al.,* at pp. 2-3. Additionally, the following question is presented:

Whether the court below clearly erred in finding on the evidence before it that an environmental impact statement on a proposed percentage increase in rail freight rates was inadequate where such impact statement failed to consider or explain the discriminatory treatment of ferrous scrap compared with other recyclables and iron ore.

STATEMENT OF THE CASE

Appellees herein incorporate by reference the Statement of the Case set forth in the brief of Appellees Students Challenging Regulatory Agency Procedures (SCRAP), Environmental Defense Fund, *et al.*, at pp. 4-15.

SUMMARY OF ARGUMENT

I. This Court has no jurisdiction over the instant appeals because the statute under which review is sought authorizes appeal only from the grant or denial of an injunction and Appellants appeal only from the grant of a declaratory judgment. The lower court's order did not coerce or restrain the action of any party—the primary characteristic of an injunction. Nor has the order been treated as an injunction by Appellants since no stay of the lower court's order was sought by Appellants.

II. The lower court had jurisdiction to review the Interstate Commerce Commission's (hereinafter ICC or Commission) orders of October 4, 1972 and May 7, 1973 for the purpose of considering compliance with NEPA. (National Environmental Policy Act, 42 U.S.C. §§ 4331 et seq.) No statutory prohibition of judicial review existed, given the posture of this case. In addition, the case was ripe for review under the standards previously enunciated by this Court. Since no administrative remedy existed for any Appellee hereunder, no question of exhaustion of administrative remedies is present. Accordingly, it was appropriate for the lower court to have reviewed the ICC orders.

III. The proper standard for reviewing the ICC's environmental impact statement is the rule of reason test adopted by virtually all circuit courts of appeal. The lower court's factual findings with respect to the

insufficiency of the environmental impact statement are to be tested in this Court by the "clearly erroneous" standard.

The lower court's opinion, *Students Challenging Regulatory Agency Procedures* v. *United States,* 371 F.Supp. 1291 (D.D.C. 1974) (Gov. J.S. at 1a), properly applied the rule of reason standard. The apparent bulk of the ICC's impact statement in the proceeding at issue is deceptive because the ICC failed to respond to the issues raised repeatedly by other federal agencies throughout the course of this proceeding. The comments and suggestions of the Council on Environmental Quality, the Environmental Protection Agency, the Departments of Commerce and Interior and the General Services Administration were ignored. The ICC based its finding of lack of environmental implications on one unsubstantiated conclusion which was disputed by other federal agencies. In addition, the ICC refused to examine the underlying rate structure for possible discrimination against recyclable commodities, asserting that it had discretion when to make this examination. This assertion of discretion is in violation of the mandate of NEPA of compliance "to the fullest extent possible." Because the underlying rate structure has subsequently been studied by the ICC in Ex Parte No. 270, the ICC properly should have returned to the lower court to seek modification of the court's order if it believed that impact statement to be in compliance with NEPA rather than impose upon the time of this Court. Alternatives to the approved rate increases were suggested by numerous commentators and should have received reasoned consideration in the impact statement. These include: other allocations of the railroads' revenue needs; the inadequacy of an action under Section 13 of the Interstate Commerce Act for enabling shippers to challenge the discriminatory rate structure

imposed on recyclable commodities; and the disproportionate burden borne by ferrous scrap vis-a-vis other commodities, including iron ore. In addition, the Commission failed to explain in the impact statement why it had concluded that a "holddown" (limitation of rate increase) on all recyclable commodities but ferrous scrap would benefit the environment but a holdown on ferrous scrap would not likewise benefit the environment. Finally, given the circumstances of the Ex Parte No. 281 proceeding, it would have been appropriate for the ICC to have held a hearing on its draft environmental impact statement. Given all of these substantial deficiencies in the Commission's impact statement, the court was not "clearly wrong" in its findings of inadequacy under the rule of reason test.

Additionally, it was appropriate for the lower court to have placed reliance on the conclusions of five other federal agencies that the ICC had not complied with NEPA.

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO CONSIDER THE APPEALS

Appellants contend that this Court's jurisdiction of the appeals from the lower court's decision here at issue rests on 28 U.S.C. § 1253. This section provides for direct appeal to this Court:

> "from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by an Act of Congress to be heard and determined by a district court of three judges."

It is settled that this provision allows a direct appeal only to a party which did not prevail on such grant or denial of injunctive relief and that the party which did prevail has no right to direct appeal on other issues.

Public Service Commission v. *Brashear Freight Lines, Inc.*, 306 U.S. 204 (1939).

These appeals are from the order of a three-judge district court which (a) denied an injunction sought by Appellees to restrain the collection of certain railroad freight rate increases, and (b) vacated ICC orders which found said freight rate increases "just and reasonable" and remanded the matter to the ICC. Appellants prevailed in the denial of injunctive relief by the three-judge district court and, therefore, have no right of direct appeal to this Court under 28 U.S.C. § 1253.

Appellants contend that any court action vacating an order of the ICC is an injunction which affords the United States, and any party opposing such court action, a right of direct appeal to this Court under 28 U.S.C. § 1253. Such contention is without merit. Previous cases in which direct appeal has been allowed have been ones in which:

(1) the vacating of the ICC order would have prohibited a regulated carrier from taking some action not allowed in the absence of an ICC order;[1]

(2) the vacating of the ICC order would have allowed a regulated carrier to take some action which the vacated order would have prohibited;[2] or

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[1] *United States* v. *Dixie Highway Express, Inc.*, 389 U.S. 409 (1967) (appeal from order of three-judge district court enjoining issuance by ICC of certificate of convenience and necessity without which carrier could not operate); *Railway Express Agency, Inc.* v. *United States*, 82 S.Ct. 466 (Harlan, Associate Justice, 1962) (appeal from order of three-judge district court refusing to enjoin issuance of certificate of convenience and necessity without which carrier could not operate); *United States* v. *Idaho*, 298 U.S. 105 (1936) (appeal from order of three-judge court vacating ICC order authorizing abandonment of a rail line, without which authorization carrier could not abandon such line).

[2] *Chicago & Eastern Illinois R.R. Co.* v. *United States*, 375 U.S. 150 (1963) (appeal from order of a three-judge district court refusing

(3) the vacating of, or refusal to vacate, the ICC order did not directly require any action or inaction by a regulated carrier, but was coupled with additional court action prohibiting, or refusing to prohibit, a regulated carrier from taking some action under the order in question.[3]

In all of these instances, the vacating of the ICC order had a necessary, coercive impact on what some party could or could not do, *or* was accompanied by the court's granting, or refusing to grant, an order which would have coerced directly some action or inaction of a party. Such is not the situation in this appeal. Vacating the ICC findings that the rates in question are just and reasonable has had no coercive impact on the Appellants. No coercion of the ICC arose from the lower court's decision, as evidenced by the fact that the Commission has taken no further action in Ex Parte No. 281. The railroads may collect the freight rate increases which are the subject of the vacated orders and, indeed, have done so. The sole effect of vacating the orders is

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to set aside an ICC order disallowing certain rates); *United States* v. *Hancock Truck Lines, Inc.*, 324 U.S. 774 (1945) (appeal from order of three-judge district court vacating certain provisions in a certificate of convenience and necessity which restricted the operation of a carrier); *St. Louis & O'Fallon Ry. Co.* v. *United States*, 279 U.S. 461 (1929) (appeal from order of a three-judge district court setting aside in part an order requiring carrier to pay excess profits to ICC, *i.e.*, preventing carrier from retaining certain profits).

[3] *Atchison, Topeka & Santa Fe Ry. Co.* v. *Wichita Board of Trade*, 412 U.S. 800 (1973) (appeal from order of three-judge district court enjoining collection of rates and vacating order of ICC finding such rates just and reasonable); *Luckenbach Steamship Co., Inc.* v *United States*, 364 U.S. 280 (1960) (memorandum per curiam) (appeal from denial of injunction sought to prohibit collection of certain rates which ICC refused to suspend pending investigation); *United States* v. *Idaho*, *supra*, note 1. (appeal from order of three-judge district court enjoining abandonment of rail line); *Alabama* v. *United States*, 279 U.S. 229 (1929) (appeal from order of a three-judge district court refusing to enjoin collection of rates found by ICC to be just and reasonable).

that the burden of proving the justness and reasonableness of the rates in any action for reparations remains on the railroads.[4]

The concept of coercion, either to act or to refrain from acting, is central to an injunction. "An injunctive order is an extraordinary writ, enforceable by the power of contempt." *Gunn* v. *University Comm. to End the War in Viet Nam,* 399 U.S. 383 at 399 (1970). The order of the three-judge district court which is the subject of this appeal is not an injunction. This conclusion is reinforced by the fact that Appellants have not sought a stay pending appeal, which the Appellants could reasonably have been expected to do if they genuinely believed that the district court order was an injunction enforceable by contempt proceedings, or, indeed, if that order was causing them any practical harm.

There is adequate reason for allowing an expedited direct appeal to this Court when the setting aside of an ICC order materially affects the ability of the transportation industry to operate, *e.g.,* when service is not provided because an order granting a certificate of convenience and necessity is set aside. Such judicial action could "paralyze totally the operation of an entire regulatory scheme." *Kennedy* v. *Mendoza-Martinez,* 327 U.S. 144 at 154 (1963). Here, however, there is neither the potential for, nor the fact of, such disruption.

In essence, the order of the district court is a declaratory judgment that the findings of fairness and reasonableness by the ICC are ineffective because the ICC's efforts to comply with certain requirements of law in making such findings were "substantially deficient." 371 F.Supp. at 1293 (Gov. J.S. at 6a). The Court, in the past, has held that declaratory judgments rendered

[4] Discussed in detail at p. 45, n. 48, *infra.*

by a three-judge district court may not be appealed directly to this Court under 28 U.S.C. § 1253. These holdings and the rationale for them are set forth in *Mitchell* v. *Donovan,* 398 U.S. 427 at 430-1 (1970) (footnotes omitted), as follows:

> "That leaves us with the question whether an order granting or denying only a declaratory judgment may be appealed to this Court under § 1253. In a recent case, Rockefeller v. Catholic Medical Center, 397 US 820, . . . , we gave a negative answer to that question, and we adhere to that decision. Section 1253 by its terms grants this Court jurisdiction only of appeals from orders granting or denying injunctions. While there are similarities between injunctions and declaratory judgments, there are also important differences. Kennedy v. Mendoza-Martinez, 372 US 144. . . . The provisions concerning three-judge courts, including the provisions for direct appeal to this Court, antedate the Declaratory Judgment Act of 1934, but Congress substantially amended the three-judge court provisions in 1937 and 1948 without providing for such direct appeals from orders granting or denying declaratory judgments.
>
> "We have stressed that the three-judge-court legislation is not 'a measure of broad social policy to be construed with great liberality,' but is rather 'an enactment technical in the strict sense of the term and to be applied as such.' Phillips v. United States, 312 US 246. . . . Thus this Court's jurisdiction under that legislation is to be literally construed. It would hardly be faithful to such a construction to read the statutory term 'injunction' as meaning 'declaratory judgment.'
>
> "We conclude, therefore, that this Court lacks jurisdiction of the appeal."

Since the appeals herein are not from an order granting or denying an injunction in opposition to the position of Appellants, this Court lacks jurisdiction.

II. THE LOWER COURT HAD JURISDICTION TO REVIEW THE ICC ORDERS OF OCTOBER 4, 1972 AND MAY 7, 1973, AND IT WAS APPROPRIATE TO REVIEW THESE UPON ISSUANCE OF THE MAY 7, 1973 ORDER TERMINATING THE GENERAL REVENUE PROCEEDING.

The railroads contend that the lower court lacked jurisdiction to review the Commission's order served October 4, 1972, which approved the general rate increase on recyclable commodities, and the Commission's order served May 7, 1973, which permitted that increase to go into effect. Significantly, the Commission does not press this issue. The Commission is on record in a previous case in this Court that judicial jurisdiction of some aspects of its general revenue orders does exist. Brief of the United States, the ICC, and the Secretary of Agriculture in *Atlantic City Electric Co.* v. *United States* and *Alabama Power Co.* v. *United States,* Nos. 70-78 and 70-106.

The statutory jurisdiction of the lower court in this case, however, is clear. If any issue exists, it is the appropriateness of review of these orders under the doctrines of ripeness and exhaustion of administrative remedies.[5] Based upon the various factors outlined by this Court in *Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967), the instant case is ripe for review. Additionally, because no administrative remedy exists, no question of exhaustion is presented.

A. Statutory Jurisdiction to Review.

Jurisdiction of the lower court to consider the issues raised in the instant litigation is based upon 28 U.S.C. §§ 1136, 2201, 2321-5. The railroads cite no statutory authority limiting that broad grant of jurisdiction to the federal district courts. As this Court noted, "judicial review of a final agency action by an aggrieved

[5] *See* 371 F.Supp. at 1296 (Gov. J.S. at 14a).

person will not be cut off unless there is a persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories* v. *Gardner, supra,* 387 U.S. at 140.[6]

The present posture of the case is clearly distinguishable from the situation considered by this Court in its October 1973 term in *United States* v. *Students Challenging Regulatory Agency Procedures ("SCRAP")*, 412 U.S. 669 (1973), where this Court concluded that no jurisdiction existed for a lower court to issue an injunction with respect to an interim surcharge pending investigation of the proposed rate increase.[7] In that decision, the Court concluded that the language and history of Section 15(7) of the Interstate Commerce Act [49 U.S.C. § 15(7)] indicated clearly that:

> "Congress had vested exclusive power in the Commission to suspend rates pending its final decision on their lawfulness, and had deliberately extinguished judicial power to grant such relief." 412 U.S. at 691.

No comparable deliberate Congressional purpose to cut off judicial review has been shown once the Section 15(7) proceeding has been completed and the ICC has issued its final order in the rate investigation proceeding.

In *Atlantic City* and *Alabama Power, supra,* the Government argued that:

> "All three of the federal government parties [including the ICC] on whose behalf this brief is filed are in agreement with the appellants in both cases that the courts below applied an erroneous prin-

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[6] As discussed at p. 13, *infra*, the ICC orders of October 4, 1972 and May 7, 1973 are "final" as that term is utilized by this Court in *Abbott Laboratories*.

[7] In its prior decision in this case, this Court specifically noted that it was not expressing a view on the jurisdiction of the lower court to review an ICC general revenue order for compliance with NEPA. 412 U.S. at 698, n.22.

ciple in dismissing the cases before them. Specifically, all three agree that the plaintiffs in *Alabama Power* are entitled to immediate judicial review of the issue presented there. . . . [W]e believe that the Commission's orders were not *per se* unreviewable. . . ." Brief for the United States, the Secretary of Agriculture and the Interstate Commerce Commission at pp. 16-17.

* * * *

"The Commission has made it clear that its revenue decision is administratively final, and would not be considered further in any potential future proceeding challenging particular rates. Accordingly, the presumption in favor of judicial review of adverse agency action applies. *E.g., Abbott Laboratories* v. *Gardner*, 387 U.S. 136. . . ." *Id.* at 19.

B. Appropriateness of Review.

In order to avoid judicial interference in the administrative process and to avoid imposing unnecessary burdens on the judicial machinery from premature requests for judicial review of administrative actions, the judiciary has developed additional requirements which a party challenging administrative action must satisfy before a court will be permitted to consider that challenge—ripeness for judicial determination and exhaustion of all appropriate administrative remedies. A review of the various factors weighed by the courts in determining whether a matter is ripe for determination shows that no basis for judicial deference existed in the instant case. Additionally, no administrative remedy existed which would permit *any* of the parties to challenge the adequacy of the ICC environmental impact statement in a subsequent administrative proceeding. Accordingly, the issue of exhaustion of administrative remedies is not present in this case. Therefore, it was appropriate for the lower court to review the Commission's orders of October 4, 1972 and May 7, 1973.

1. *The Case Was Ripe for Review.*

The administrative consideration of the environmental impact statement has been completed. The ICC stated specifically in its May 7, 1973 order that its Ex Parte No. 281 proceeding was discontinued (Gov. J.S. at 1e). The requisite finality of this proceeding, thus, existed. The Government notes in its brief that the agency decision with respect to environmental factors was final (Gov. Br. at 27).

In addition, the questions presented are "fit" for review at this time. No further administrative actions are contemplated in this proceeding. Judicial review, therefore, does not interfere with the administrative process. In addition, the ICC knows the basic issues raised by Appellees and others and has had sufficient opportunity to correct the record. An ample administrative record exists to afford review of the issues raised.

The approach suggested by the railroads of requiring environmental issues to be raised in potential Section 13(1) proceedings, even if possible, only raises the probability of a multiplicity of lawsuits. Rather than conserving judicial energy, this approach serves only to risk dissipating those energies.[8]

Finally, the public interest in this particular case was best served by prompt judicial review of the ICC action. The rate increases approved by the Commission in Ex Parte No. 281 already had been permitted to go into effect. Thus, no considerations of impairment of the present economic health of the railroads existed. Balanced against this lack of injury to either the rail roads or the ICC is the Congressional policy objec-

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[8] The Government likewise suggests that such an approach would dissipate the ICC's energy as well. (Joint Appendix in 73-1966 and 73-1971 [hereinafter A.] at 21.)

tive of requiring federal administrative agencies to consider the environmental implications of their actions. This Congressional objective can be enforced adequately only if administrative environmental impact statements are reviewed expeditiously. Failure to require compliance with NEPA raises the possibility of irreparable harm to the environment.

Based upon the standard enunciated by this Court in *Abbott Laboratories, supra,* 387 U.S. at 148-53, the instant case clearly is ripe for judicial review.

2. *No Administrative Remedy Exists.*

The railroads have suggested that this Court require the parties to seek consideration of the environmental issues in rate-by-rate administrative proceedings under Section 13(1) of the Interstate Commerce Act [49 U.S.C. § 13(1)]. But even if a shipper were to seek, *in a Section 13(1) proceeding,* to test ICC compliance with NEPA in a previous *general revenue proceeding,* that issue probably would not be relevant. A Section 13(1) proceeding would involve a challenge to a particular rate on a particular route. If that rate were just, reasonable, and nondiscriminatory, the Commission would have no power to alter it. Clearly, a shipper could not bring a Section 13 complaint against a particular carrier based solely on the failure of the ICC to comply with NEPA. No administrative remedy exists to test ICC compliance with NEPA in a general revenue proceeding which has been terminated, as this one has been. Thus, it was appropriate for the lower court to have considered the matters raised by parties challenging the Commission's orders of October 4, 1972 and May 7, 1973 as they relate to compliance with NEPA.

Despite the railroads' efforts to portray the law as settled that no aspect of a general revenue proceeding is appropriate for judicial review except on appeal

from a decision in a Section 13 proceeding, this is not an accurate statement of the law. As both this Court, and the lower court have noted, this question is not settled.[9] The Government clearly did not subscribe to the railroads' position in the *Atlantic City* and *Alabama Electric* cases. Quoting again from the Government brief in those cases:

> "The railroads argue that review is not now available because the shippers have allegedly not exhausted their administrative remedies by attacking the rates of interest to them in case-by-case proceedings under Sections 13 and 15(1) of the Interstate Commerce Act. *But there is nothing in the statutory scheme that evidences any Congressional intent that such further administrative proceedings precede judicial review of a final general revenue-need determination such as the Commission has made here, and the general doctrine of exhaustion of administrative remedies erects no barrier under the circumstances of this case.* That doctrine is simply another aspect of the finality requirement, and it does not apply here because the *Commission has fully considered and reconsidered the revenue questions;* there is *no premature interruption of the administrative process* and *no likelihood that the agency would itself give the general relief that the appellants seek. . . .*" (emphasis added). Brief of United States, Secretary of Agriculture, and ICC, *supra,* at 19-20.

This basic issue of judicial review pursuant to the Interstate Commerce Act in general revenue proceedings does not require resolution in the instant case. This Court need only determine that the judiciary does have jurisdiction to consider compliance by the ICC with NEPA in such a proceeding. But it should be recalled that the Commission's position in *Atlantic City*

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[9] *Atchison, Topeka & Sante Fe Ry. Co.* v. *Wichita Board of Trade, supra,* 412 U.S. at 814; 371 F. Supp. at 1296 (Gov. J.S. at 15a).

and *Alabama Power* was that general revenue proceedings are directly reviewable even without regard to NEPA. A fortiori, the present proceeding was reviewable to determine the NEPA issue.

III. THE COMMISSION'S ENVIRONMENTAL IMPACT STATEMENT IS TO BE TESTED BY A RULE OF REASON; THE LOWER COURT'S FINDING THAT THIS STANDARD HAS NOT BEEN MET IS NOT CLEARLY ERRONEOUS; AND THE LOWER COURT'S DETERMINATION THAT THE ICC DID NOT COMPLY WITH THE REQUIREMENTS OF NEPA IS CORRECT.

This Court should confirm the rule enunciated by the majority of circuit courts of appeal that judicial review of the content of an environmental impact statement is to be based upon a rule of reason test. When the content of the ICC's environmental impact statement in the instant case is examined pursuant to this test, the flaws are so substantial that this Court should not find to be clearly erroneous the lower court's determinations that the impact statement was inadequate. These flaws include: (1) the failure to respond in a reasoned manner to the adverse comments of five separate federal agencies; (2) the failure to undertake the necessary study of the underlying rate structure; (3) the failure to provide sufficient data of the impact of the rate increase on the environment; (4) the failure to explain the discrepancy in reasoning between allowing a hold-down on non-ferrous recyclable material but no hold-down on ferrous scrap; and (5) the failure to hold a hearing on the draft impact statement. The lower court's decision neither interferes with the administration of the Interstate Commerce Act nor imposes any barrier to railroad rate increases. It should be affirmed as a fair and reasonable accommodation of the obligations imposed on the Interstate Commerce Com-

mission by the Interstate Commerce Act and those imposed by NEPA.

A. The Proper Test for Review of an Environmental Impact Statement is the Rule of Reason.

With the exception of the railroads, all other parties appear to agree on the proper test for judicial review of an environmental impact statement required under Section 102(2)(C) of NEPA [42 U.S.C. § 4332(2)(C)].[10] The court must first examine whether the impact statement has been prepared in the proper form and with the appropriate consultations and publicity required by Section 102(2)(C)—namely, (1) preparation of a detailed impact statement covering the five items set forth in the statute;[11] (2) consultations with other Federal agencies having jurisdiction by law or possessing special expertise with respect to the environ-

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[10] The test proposed by the railroads—whether the agency gave detailed consideration to all of the factors mandated by NEPA—would apparently limit a court to an examination of whether the five factors outlined in Section 102(2)(C) have been discussed, without regard to the adequacy—or even the accuracy—of that discussion. The railroads label all further judicial consideration of the impact statement as substantive and subject to the stringent arbitrary and capricious test of 5 U.S.C. § 706(2)(A). The railroads attempt to equate review of the *content* of an environmental impact statement with review of the *underlying action* which is the subject of the impact statement.

[11] These five items are:

"(i) The environmental impact of the proposed action,
(ii) Any adverse environmental effects which cannot be avoided should the proposal be implemented,
(iii) Alternatives to the proposed action,
(iv) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
(v) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." [42 U.S.C. § 4332(C)(i)-(v).]

mental impact involved; (3) submission of the statement to the President, the Council on Environmental Quality, and the public; and (4) consideration of the statement in conjunction with the proposed action through the existing agency review processes.[12] Once this preliminary examination has been completed, the court then is to review the content of the impact statement utilizing a rule of reason test.[13] If the court is satisfied that this test has been met it may review the underlying decision to see whether that decision was arbitrary and capricious or an abuse of discretion in view of the information developed in the impact statement.[14]

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[12] Text of 42 U.S.C. § 4332(2)(C) following subparagraph (v).

[13] The Government waivers on its support for the rule of reason test, however, with respect to the question of whether the ICC was required to include a discussion of the underlying rate structure in the Ex Parte No. 281 impact statement, inexplicably suggesting an arbitrary and capricious standard for this question (Gov. Br. at 44).

[14] The Ninth Circuit recently determined, *en banc*, that review of an environmental impact statement, including review of the content of that statement, is governed by 5 U.S.C. § 706(2)(D), which provides:

> ". . . The reviewing court shall—(2) hold unlawful and set aside agency actions, findings and conclusions found to be—(D) without observance of procedure required by law."

The Court of Appeals concisely explained the policy considerations involved as follows:

> "We stand on § 706(2)(D) because NEPA is essentially a procedural statute. Its purpose is to assure that, by following the procedures that it prescribes, agencies will be fully aware of the impact of their decisions when they make them. The procedures required by NEPA, 42 U.S.C. § 4332(2)(C), are designed to secure the accomplishment of the vital purpose of NEPA. That result can be achieved only if the prescribed procedures are faithfully followed; grudging, *pro forma* compliance will not do. We think that the courts will better perform their necessarily limited role in enforcing NEPA if they apply § 706(2)(D) in reviewing environmental impact statements for compliance with NEPA than if they confine themselves with the straight jacket of § 706(2)(A)." *Lathan* v. *Brinegar*, 7 ERC 1048 at 1058 (9th Cir. 1974).

The rule of reason test has been adopted by virtually all circuit courts of appeal.[15] This test was described by the Tenth Circuit in the following terms:

> "[T]he review of FES [Final Environmental Statement] is limited to the following:
> (1) Whether FES discusses all of the five procedural requirements of NEPA.
> (2) Whether the environmental impact statement constitutes an objective good faith compliance with the demands of NEPA.
> (3) Whether the statement contains a reasonable discussion of the subject matter involved in the five required areas."
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> *National Helium Corp.* v. *Morton*, 486 F.2d 995 at 1102-3 (10th Cir. 1973).

The Tenth Circuit, in *National Helium*, expressly followed Judge Wright's opinions in *Calvert Cliffs' Coord. Comm., Inc.* v. *AEC*, 449 F.2d 1109 (D.C. Cir. 1971) and *Scientists' Inst. for Public Information, Inc.* v. *AEC*, 481 F.2d 1079 (D.C. Cir. 1973). *See* 486 F.2d at 1001-2.

An essential requirement of the "rule of reason" is that "a reasonable discussion of the subject matter involved," *National Helium, supra,* must include enough information about the environmental consequences of proposed action, and about alternatives thereto, to al-

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[15] *Silva* v. *Lynn*, 482 F.2d 1282 at 1284-5 (1st Cir. 1973); *Conservation Council* v. *Frochlke*, 473 F.2d 664 at 665 (4th Cir. 1973); *Environmental Defense Fund* v. *Corps of Engineers* (Tombigbee Waterway), 492 F.2d 1123 at 1131 (5th Cir. 1974); *Louisiana* v. *FPC*, 503 F.2d 844 at 877 (5th Cir. 1974); *Natural Resources Defense Council, Inc.* v. *TVA*, 502 F.2d 852 at 853-54 (6th Cir. 1974); *Sierra Club* v. *Froehlke*, 486 F.2d 946 at 950 (7th Cir. 1973); *Environmental Defense Fund* v. *Corps of Engineers* (Gillham Dam), 470 F.2d 289 at 296 (8th Cir. 1972); *Lathan* v. *Brinegar, supra.* 7 ERC 1048 at 1058 (9th Cir. 1974); *National Helium Corp.* v. *Morton*, 486 F.2d 995 at 1001-3 (10th Cir. 1973); *Calvert Cliffs' Coord. Comm., Inc.* v. *AEC*, 449 F.2d 1109 at 1115 (D.C.Cir 1971); *Scientists' Inst. for Public Information, Inc.* v. *AEC*, 481 F.2d 1079 at 1092 (D.C. Cir. 1973).

low informed decision-making. *See, e.g., Natural Resources Defense Council, Inc.* v. *Morton,* 458 F.2d 827 at 835 (D.C. Cir. 1972) (also expressly followed in *National Helium*); and *Silva* v. *Lynn,* 482 F.2d 1282 at 1284-5 (1st Cir. 1973). The agency must "explicate fully its course of inquiry, its analysis and its reasoning." *Ely* v. *Velde,* 451 F.2d 1130 at 1139 (4th Cir. 1971).

Finally, it should be emphasized that the lower court did not in any way attempt to substitute its judgment for that of the ICC on the underlying question of whether freight rates on recyclables should be allowed to go into force.[16] The "arbitrary and capricious" test for judicial review of a *substantive* agency action, which is the subject of an environmental impact statement, is simply not relevant in the instant case.[17]

As shown in the succeeding sections, the lower court correctly applied the rule of reason in the instant case.

B. The Lower Court's Factual Determinations Are Subject to Review in this Court by a "Clearly Erroneous" Standard.

Rule 52(a) of the Federal Rules of Civil Procedure requires that this Court affirm the three-judge panel's

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[16] The lower court specifically noted: "because we view the Commission's efforts to comply with NEPA's procedural commands to be sorely deficient, we do not reach the question whether the Commission clearly gave insufficient weight to this environmental value." 371 F.Supp. at 1299 (Gov. J.S. at 22a).

[17] The Government devotes three pages of its brief to a suggestion that the lower court had undertaken a *de novo* review of the evidence and that such review is improper. (Gov. Br., 37-39.) This would appear to be a misreading of the court's opinion. All that the court suggested was that if the ICC relied on Ex Parte No. 270 to satisfy its obligation to examine the underlying rate structure, it should adopt the position expressed by one Commissioner of delaying rate increases until that proceeding is completed. The Court *did not require the ICC to take this action,* nor did it hold that the impact statement was inadequate for a failure to impose a rate moratorium on recyclables. How such an observation becomes *de novo* review of the impact statement is unclear.

factual findings on the insufficiency of the Commission's environmental impact statement unless it finds them to be "clearly erroneous."[18] This Court, in the leading case on the issue, defined the "clearly erroneous" standard as follows:

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the *definite* and *firm* conviction that a mistake has been committed." (Emphasis added) *United States* v. *United States Gypsum Co.*, 333 U.S. 364 at 395 (1948).

The words "definite" and "firm" simply mean that a heavy presumption rests in favor of the lower court's factual findings. As one court phrased it, these findings come to the appellate level "well armed with the buckler and shield" of the "clearly erroneous" standard of Rule 52(a). *Horton* v. *United States Steel Corp.*, 286 F.2d 710 at 713 (5th Cir. 1961). Accordingly, it is not the role of an appellate court to second guess factual findings of a district court even if there may be real ambiguities in the evidence. As this Court put it:

> "It is not enough that we might give the facts another construction, or resolve the ambiguities differently. . . . We are not given those choices, because our mandate is not to set aside findings of fact 'unless clearly erroneous.'" *United States* v. *National Association of Real Estate Boards*, 339 U.S. 485 at 495-6 (1950).[19]

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[18] The "clearly erroneous" standard has been previously applied in appellate review of a district court's findings on the sufficiency of an environmental impact statement. *See Environmental Defense Fund* v. *Corps of Engineers*, 492 F.2d 1123 at 1137 (5th Cir. 1974).

[19] *See also, Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 at 123 (1969): "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo. The authority of an appellate court,

The deference which an appellate court is required to give the findings of the district court is not lessened where the district court's findings are based on documentary evidence. As the Supreme Court stated in *United States* v. *United States Gypsum Co.*, the "clearly erroneous" test is also applicable to "inferences drawn from documents or undisputed facts." 333 U.S. at 394. This rule has been repeatedly reaffirmed by this Court, and followed by federal appellate courts, since the *Gypsum* case.[20] It is based on important policy considerations. According to Professor Wright, "[e]ven in instances where an appellate court is in as good a position to decide as the trial court, it should not disregard the trial court's finding, for to do so impairs confidence in the trial courts and multiplies appeals with attendant expense and delay." WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE § 2587 at 748 (1971 ed.).[21]

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when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence. The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether 'on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed.' United States v. United States Gypsum Co. 333 US 364, 395."

[20] *E.g.*, *Zenith Radio Corp.* v. *Hazeltine, supra; United States* v. *Singer Manufacturing Co.*, 374 U.S. 174 at 195, n.9 (1963); *Commissioner* v. *Duberstein*, 363 U.S. 278 at 291 (1960); *United States* v. *E. I. Du Pont de Nemours & Co.*, 351 U.S. 377 at 381 (1956); *Graver Tank Co.* v. *Linde Air Prod. Co.*, 339 U.S. 605 at 609-10 (1950). *See also, Engine Specialties, Inc.* v. *Bombardier Limited*, 454 F.2d 527 at 530 (1st Cir. 1972); *Custom Paper Prods. Co.* v. *Atlantic Paper Box Co.*, 469 F.2d 178 at 179 (1st Cir. 1972); *Bishop* v. *United States*, 223 F.2d 582 at 586-7 (D.C.Cir. 1955), *rev'd on other grounds*, 350 U.S. 961 (1956).

[21] *See also*, Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN.L.REV. 751, 764-71, 778-82 (1956); *Pendergrass* v. *New York Life Ins. Co.*, 181 F.2d 136 at 138 (8th Cir. 1950): "The

The "clearly erroneous" standard is especially necessary when the appellate court is asked, as in the instant case, to review a lower court opinion which is based on an assessment of various technical and expert opinions and complex and lengthy economic analyses. *See, e.g., Graver Tank Co.* v. *Linde Air Prod. Co., supra,* 339 U.S. at 611.

Thus, this Court ought not reverse the lower court's decision simply because Appellants urge that an alternative interpretation of the sufficiency of the environmental impact statement is possible. Even if such an alternative interpretation were equally reasonable—which is not the case here—this Court must still affirm the lower court's findings under the "clearly erroneous" test. *E.g., United States* v. *National Association of Real Estate Boards, supra,* 339 U.S. at 495-6. The lower court found here, *as a matter of sound economics,* that it is not possible to determine the economic (and thus the environmental) impact of the proposed rate increase on the basis of the evidence provided in the Commission's impact statement. There is nothing in the record here that would support a "definite" and "firm" conviction that this finding was wrong, so as to justify reversal under the "clearly erroneous" standard of Rule 52(a). *United States* v. *United States Gypsum Co., supra,* 333 U.S. at 395.

C. The Lower Court Properly Applied the Rule of Reason Test and Its Findings of Fact are Not Clearly Erroneous.

The lower court approached its task of reviewing the ICC's impact statement cognizant of the fact that

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entire responsibility for deciding doubtful fact questions in a nonjury case should be, and we think it is, that of the district court. The existence of any doubt as to whether the trial court or this Court is the ultimate trier of fact issues in nonjury cases is, we think, detrimental to the orderly administration of justice, impairs the confidence of litigants and the public in the decisions of the district courts, and multiplies the number of appeals in such cases."

Congress had mandated compliance with NEPA by federal administrative agencies "to the fullest extent possible" [22] and that this provision has been interpreted uniformly by the courts as requiring maximum effort by these agencies, not as "an escape hatch" permitting minimal compliance.[23] Given (1) the lack of enthusiasm of the ICC in acknowledging and carrying out its obligations under NEPA,[24] (2) the failure of

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[22] 371 F.Supp. at 1298 (Gov. J.S. at 21a).

[23] Judge Wright in *Calvert Cliffs' Coord. Comm., Inc.* v. *AEC*, *supra*, 449 F.2d at 1115, quoted from the conference report of the House and Senate approving NEPA to the effect that " 'to the fullest extent possible' shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in section 102. . . . [N]o agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance." Based on this language, Judge Wright concluded "the Section 102 duties are not inherently flexible. They must be complied with to the fullest extent, unless there is a clear conflict of *statutory* authority. [footnote omitted] Considerations of administrative difficulty, delay or economic cost will not suffice to strip the section of its fundamental importance." *Id.*

[24] With respect to the requirement under NEPA that a federal agency make a "good faith" effort to prepare a detailed environmental impact statement, it is relevant to recall the ICC's initial recalcitrance in resisting the strong recommendations by several federal agencies on the necessity of an environmental impact statement. The ICC's obvious lack of enthusiasm for such a statement at the outset could well have affected the manner in which is ultimately approached the writing of a statement at a later time. The ICC did not promulgate regulations outlining its procedures for compliance until March 28, 1972, more than two years after NEPA's enactment. (Gov. Br. at 6, 58-62.) The lower court observed with respect to ICC efforts in this case:

> "Though the Commission had told the Chief Justice, in connection with its application for a stay of our order against the temporary surcharge, as well as this court, that it was developing an impact statement, no statement was prepared for consideration at this hearing or even for consideration by the Commission before issuing its decision on the permanent increases." 371 F.Supp. at 1294 (Gov. J.S. at 9a).

When this order was suspended with respect to recyclable commodi-

the Commission to come to grips with the issues posed by other governmental agencies, and (3) the official position of these agencies that the ICC was not in compliance with NEPA, the lower court was correct in its conclusion that the ICC impact statement did not represent reasonable compliance with the mandate of NEPA. Fundamental flaws appear on the face of the final environmental impact statement itself. As discussed in the succeeding subsections of this brief, these flaws were repeatedly brought to the ICC's attention by EPA, CEQ and other federal agencies and by Appellees. The combined efforts of these parties, however, were insufficient to persuade the Commission to address the questions which NEPA requires the Commission to consider.

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ties, it was done only as the result of vigorous protests by EPA and CEQ, not out of any concern by the ICC for its NEPA obligations. (A. at 572-5, 566-72, respectively.) At the time of the lower court's decision, every environmental impact statement filed by the Commission had been filed as the result of judicial intervention in that proceeding.

Every other court which has reviewed ICC actions for compliance with NEPA has been critical of the Commission's efforts: (i) *Harlem Valley Trans. Assn.* v. *Stafford*, "The ICC has been slow in reacting to the directions of NEPA . . . ," 500 F.2d 328 at 331 (2d Cir. 1974); (ii) *City of New York* v. *United States*, "Such considerations do not justify the Commission's disregard of the law. . . . To permit an agency to ignore its duties under NEPA . . . would subvert the very purpose of the Act and encourage further administrative laxity in this area." 337 F.Supp. 150 (E.D.N.Y. 1972); and (iii) *Chemical Leaman Tank Lines, Inc.* v. *United States*, "We think that the Commission's approach seriously underestimates the nature of the analysis which [§ 102(a)(C) of NEPA], and the Act generally, contemplate." 368 F.Supp. 925 at 948 (D.Del. 1973).

Under a rule of reason test, it obviously is relevant if an agency's "track record" indicates that it will comply with NEPA only to the minimum degree necessary and then only when specifically forced to do so by the judiciary. *See Natural Resources Defense Council, Inc.* v. *Morton*, 7 ERC 1298 at 1302 (D.D.C. 1974).

1. *Failure to Respond to Comments.*

The environmental impact statement itself provides evidence of the refusal of the ICC to give thoughtful consideration to the comments received by the Commission on its draft impact statement. The Commission, in effect, conceded that its response to these comments was pro forma when it noted in the final environmental impact statement that "[t]he draft environmental impact statement was complete when issued . . . ." (A. at 16.) This view that the draft statement could be regarded as final and that the comments on the draft could be dismissed without serious response again is reflected in the Commission's reference to "post statement comments." (A. at 22.) The comment stage is meant to be a meaningful one in the environmental impact process. It is not merely a procedural obligation to be satisfied *after* the ICC has made up its mind. *Calvert Cliffs' Coord. Comm., Inc., supra,* at 1112-3, n.5. The brief recitation of the content of the various comments (A. at 22-24) and Appendix D to the final environmental impact statement (A. at 191-98) do not evidence the careful consideration of the issues raised by the commentators which is required. *Silva* v. *Lynn, supra,* 482 F.2d at 1285.

The comments of the CEQ and EPA were essentially ignored by the ICC. One example is the Commission's failure to consider the impact which the rate increase would have on long term investment decisions, even thought the ICC states in Appendix D that this issue was raised by both agencies (A. 197-98). Both EPA and CEQ had previously [in their October 30, 1972 letters to the ICC (A. 571 and 574-75)] urged that consideration be given to the effect which disparate freight rates might have on long-term investment in ore-intensive facilities versus investment in scrap-intensive facilities. The issue was not considered in the draft

environmental impact statement or met with a response in the final statement despite renewal of this suggestion in the comment period.[25]

A further question to which the ICC should have addressed itself is that of whether recycling of secondary commodities would have increased at an even greater rate but for rate disparities between primary and secondary commodities. Such a course of investigation was suggested by the Government Services Administration in its comments on the draft environmental impact statement (A. at 599). This suggestion from yet another governmental agency also was ignored by the ICC.

Another example of this failure to take the comments into consideration in the final environmental impact statement relates to the issue of whether secondary materials are subsidizing the shipment of other goods, including competing virgin materials. Numerous commentators quoted a 1969 Department of Transportation Burden Study[26] which showed that secondary materials, and particularly ferrous scrap, carry more than their proportionate share of the total rail shipment costs in comparison with other goods, including iron ore.[27] Although the detrimental environmental implications of a showing that secondary materials

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[25] Failure to consider the impact on long-term investment also is a violation of § 102(2)(C)(v).

[26] In September, 1971, the Department of Transportation (DOT) published a report entitled *Carload Waybill Statistics, 1969*, Statement TD-1. In January, 1973, DOT published a second report entitled, *An Estimation of Distribution of the Rail Revenue Contribution by Commodity Groups and Type of Rail Cars—1969*, known as the 1969 Burden Study. Excerpts from this Study were included in the record below in Plaintiff-Intervenor's Motion for Summary Judgment. Data from the 1969 Carload Waybill Statistics were a major input to the Burden Study.

[27] The Commission itself had recognized this fact at the time the lower court considered the ICC's Ex Parte No. 281 impact state-

bear more than their fair share of total freight costs are clear, the ICC made no attempt to analyze in detail these implications. The only ICC response with respect to the Burden Study contained in the impact statement is as follows:

> "It is because of these many and varied characteristics that bare reliance by a number of parties herein upon certain Burden Study statistics (which represent estimates only) to indicate the contribution a particular commodity may be making to the carriers' costs is not well taken. This matter will be amplified at a later point in this statement." (A. at 29.)

This amplification is not forthcoming and the ICC, thus, asks simply that reliance be placed in this bare conclusion. This conclusion is open to serious doubt since the ICC cites this same Burden Study for its own purposes and without qualification in the impact statement (A. at 46) and since the ICC has described this study elsewhere as "based on the most reliable information available" despite its shortcomings. 345 ICC 11 (1973).

The Government mistakes the meaning of the lower court's references to alteration of the impact statement (Gov. Br. at 36). The court, in noting the failure of the ICC to revise its impact statement to discuss the issues raised by these commentators, is not directing how the ICC is to respond to these issues; it is requiring that a reasonable response be forthcoming.

The failure of the ICC to consider the environmental implications of the underlying rate structure is discussed separately, *infra*, pp. 32-4.

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ment. In its order in Ex Parte No. 270, Commissioner Hardin noted: "while the 1969 burden study discloses that *iron and steel scrap is one of the top twenty positive revenue contributors* for movements within official territory, iron ores are similar [sic] disclosed for movements within official territory *to be one of the top twenty deficit contributors* to railroad net revenues. . . ." 38 Fed.Reg. 28600 (Emphasis added) (A. 717).

2. *Failure to Provide Adequate Data for Conclusions.*

In essence, the thesis advanced initially by the railroads and adopted by the ICC as the sole basis in the record for concluding lack of environmental effect of freight rates is that scrap rates fluctuate significantly over time and that total scrap shipments have increased despite past freight rate increases.[28] This conclusion is the sole basis cited for the ICC's conclusion that no significant environmental impact exists.

Numerous parties including EPA and CEQ have devoted extensive efforts to disproving this conclusion. As CEQ noted in its October 30, 1972 comments:

> "We also take exception with the Commission's conclusion that freight rates have no significant effect on the price of scrap and thus on the quantity consumed. The analysis presented purports to show that since the price of scrap fluctuates widely in the short run and since these fluctuations seem to have no direct relationship to changes in freight rates, rates therefore do not affect price. In actuality scrap prices are determined by a number of factors operating simultaneously, among them are the aggregate demand for steel, the price and transportation costs of iron ore, the supply of scrap, as well as the transportation cost of scrap and other factors. It would be surprising indeed, if, in light of the number of factors constantly at work in the scrap market, a close and simple relationship existed between scrap price movements and freight rate changes.
>
> "Nor does data which shows a constantly growing consumption of scrap despite rate increases prove

[28] Even to make this point, it is necessary for the Government in its brief to go outside the record before the lower court (Gov. Br. at 28). Apart from this questionable presumption, the Government is forced to quote out-of-context statements not in the record (reference to Congressional testimony of Dr. Cutler [Gov. Br. at 29] where the point made was simply that higher costs, including disproportionately high freight costs, affect demand for scrap.

that freight rate decisions are inconsequential. Growth might have been materially higher or lower had a rate decisions [sic] been different. What is needed in each instance is a multivariate analysis to isolate the effect of transportation costs on scrap prices and the quantity consumed. It cannot be presumed from the evidence presented that freight rates are insignificant." (A. at 571-2.)

EPA made a similar observation in its letter to the Commission of the same date.[29] Appellee Institute of Scrap Iron and Steel, Inc. introduced a study commissioned by it which concluded that:

"(1) Present scrap markets are retarded because of transport rates which encourage the usage of iron ore.

(2) Future scrap markets are being affected because new investment that would be logically directed to scrap-intensive steelmaking is diverted because of the existing freight-rate structure to ore-intensive steelmaking.

(3) Iron ore (a limited domestic natural resource) is being exploited when it can and should be conserved.

(4) Some scrap iron that should be recycled is unable to move, thus the environment is despoiled by unnecessary accumulations of solid metallic waste." [30]

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[29] EPA commented: "[T]he historical data presented by the Commission does not support the conclusion that the movement of the commodities will not be affected and that there will be no adverse environmental impact. The fact that, for any commodity considered, the cost to a user is a prime consideration in his decision to use the secondary material as a raw material input, and that freight rates affect the cost to that user, is prima facie evidence that the rates would affect the use of the materials." (A. at 574.)

[30] Battelle Columbus Laboratories, *Summary Report on the Impact of Railroad Freight Rates on the Recycling of Ferrous Scrap* 2 (Jan. 14, 1972) included as Attachment I to Plaintiff-Intervenor's Motion for Summary Judgment in the court below.

As the lower court noted, this study was merely dismissed by the ICC without any study of its own to refute these conclusions.[31]

The ICC suggests that it has based its impact statement on the bibliography included with the statement. Comparison of this bibliography with the impact statement shows clearly that the bibliography played little role in preparation of this statement. Only 15 works out of 527 listed in the bibliography are cited in the final environmental impact statement. The Department of Commerce expressed similar reservations about the adequacy of the utilization of this bibliography as well (A. at 578-9).

Based upon this record, the lower court did not err—still less did it "clearly" err—in concluding that the unsubstantiated assertions of the ICC did not support its conclusion that the rate increase would have no environmental impact. The lower court's suggestion that the Commission prepare a study of elasticity of demand for recyclable commodities (371 F.Supp. at 1306, Gov. J.S. at 39a-40a) was merely an attempt to require sufficient data so that the ICC, the President, the Congress, and the public can make an informed decision, on the basis of adequate evidence as to that question.[32] *See Natural Resources Defense Council, Inc.* v. *Morton, supra,* 458 F.2d at 837.

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[31] 371 F.Supp. at 1303 (Gov. J.S. at 33a-34a). The lower court quoted from a district court opinion, *Brooks* v. *Volpe* that:

> " 'The requirement that the statement be detailed places a heavy burden on government agencies to gather for and include in the impact statement enough information to show that compliance has been genuine, not perfunctory. * * * NEPA requires each agency to undertake the research needed to adequately expose environmental harms.' . . . 350 F.Supp. at 276, 279." 371 F.Supp. at 1303, n.34; (Gov. J.S. at 31a-32a).

[32] Moreover, this suggestion by the lower court merely reflected agreement by the Court with the recommendations given to the ICC by EPA and the Department of Commerce, 371 F.Supp. at 1302 (Gov. J.S. at 31a) (A. at 712 and 578).

3. *Failure to Examine the Underlying Rate Structure.*

The Commission freely acknowledges in its environmental impact statement that it did not examine the underlying rate structure in the Ex Parte No. 281 proceeding (A. at 24-6). The Commission does not argue that the underlying rate structure is irrelevant to the questions it must examine under NEPA in Ex Parte No. 281 (Gov. Br. at 40-3).

Its failure to examine the underlying rate structure is in clear violation of CEQ Guidelines, which provide:

> "The statutory clause 'major Federal actions significantly affecting the quality of the human environment' is to be construed by agencies with a view to the overall, *cumulative impact* of the action proposed. . . . Proposed actions, the environmental effect of which is likely to be highly controversial, should be covered in all cases. In considering what constitutes major action significantly affecting the environment, agencies should bear in mind that the effect of many Federal decisions about a project or complex of projects can be individually limited but cumulatively considerable." (Emphasis added) 40 C.F.R. § 1500.6(a).

Rather, the Commission argues that it may decide for itself the extent to which it will comply with NEPA in Ex Parte No. 281. No attempt is made to reconcile this purported discretion with the absolute command of NEPA that every agency shall comply with NEPA's requirements "to the fullest extent possible." [33]

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[33] As noted previously, this requirement has been interpreted uniformly as imposing a heavy burden on an agency to exert its greatest efforts to comply with NEPA. Judge Wright in *Calvert Cliffs'*, *supra*, 449 F.2d at 1114:

> "Of course, all of these Section 102 duties are qualified by the phrase 'to the fullest extent possible.' We must stress as forcefully as possible that this language does not provide an escape hatch for footdragging agencies; it does not make NEPA's procedural requirements somehow 'discretionary.' Congress did not

The ICC argues that it should be accorded time to complete its Ex Parte No. 270 proceeding before considering, in its general revenue proceedings, *any* aspect of discrimination in the underlying rate structure, even where such consideration may clearly be possible.[34] Specific investigations have been instituted of the lawfulness of all rates subject to the Interstate Commerce Act maintained by railroads on scrap iron and steel (Ex Parte No. 270, Sub. No. 6) and iron ores (Ex Parte No. 270, Sub. No. 5). An environmental impact statement has been prepared in Ex Parte No. 270, Sub. Nos. 5 and 6, and submitted to the Council on Environmental Quality in final form.

Moreover, since the environmental impact statement in Ex Parte No. 270 (Sub. Nos. 5 and 6) is only a study, it is uncertain when, if ever, the Commission will take any action based thereon. Historical evidence is not encouraging on this question. The Commission's rate structure investigation in Docket 17,000 began in 1925 and was discontinued in 1933[35] and its class rate case

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intend the Act to be such a paper tiger. Indeed, the requirement of environmental consideration 'to the fullest extent possible' sets a high standard for the agencies, a standard which must be rigorously enforced by the reviewing courts."

See also, Hanly v. *Mitchell*, 460 F.2d 640 at 648 (2d Cir. 1972); and ANDERSON, NEPA IN THE COURTS 51 (1973) where it is suggested that the Second Circuit imposes an even more stringent obligation on Federal agencies—compliance even where the agency is reluctant or powerless to alter its proposed course of action—in order to preserve the integrity of NEPA.

[34] Ex Parte No. 270 is a comprehensive investigation of the railroad's freight rate structure with the objective of identifying and initiating any corrective action shown to be necessary. Environmental Impact Statement, Ex Parte No 270 (Sub. Nos. 5 and 6) at 1-1, lodged with the clerk of this Court as part of the record in this proceeding.

[35] The Investigation of Iron and Steel Articles, Docket 17,000 Part 6, was filed in 1925, and an order issued which prescribed rates under this subdocket on June 7, 1929, 155 ICC 517 (1929).

in Docket 28,300 began in 1945 and the tariffs based on this proceeding became effective in 1952.[36] Based on these factors and in light of NEPA's express command that all federal agencies comply "to the fullest extent possible," the lower court's determination that the ICC was unreasonable in refusing to consider any part of the underlying rate structure is not erroneous, much less "clearly" so.

Most significantly, the ICC now claims that it has in fact cured, via an impact statement in Ex Parte No. 270, this alleged shortcoming in its Ex Parte No. 281 proceeding with respect to ferrous scrap. The impact statement in Ex Parte No. 270 was served August 2, 1974. Rather than return to the lower court to seek a modification of its judgment, in light of this development, the ICC unnecessarily has burdened the Court with this controversy again. The Government suggests that the preliminary evidence available to it indicated that no discrimination existed in the underlying rate structure and that the lower court acted upon "unsupported suspicion" (Gov. Br. at 44). As noted in the preceding subsection, the lower court was not clearly erroneous in its determination that the information relied upon was not sufficient. In addition, the lower court was not relying on unsupported suspicions, but rather on the record made by other federal agencies before the Commission.

4. *Failure to Discuss All Reasonable Alternatives.*

Although not discussed by the lower court, the ICC's environmental impact statement does not meet the test for discussion of alternatives mandated by NEPA as enunciated by the District Court for the District of

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[36] Cass Rate Investigation 1939, commenced 266 ICC 447 (1945) and terminated 286 ICC 171 (1952).

Columbia in *Natural Resources Defense Council, Inc.* v. *Morton, supra,* 458 F.2d at 836-7:

> "Where the environmental aspects of alternatives are readily identifiable by the agency, it is reasonable to state them—for ready reference by those concerned with the consequences of the decision and its alternatives."

Much of the discussion in the section of the Commission's final environmental impact statement entitled "Alternatives" (A. at 140-57), although quite significant, does not relate to alternatives. For example, the first eight pages of this section deal with the ICC's obligations and jurisdiction under the Interstate Commerce Act and NEPA. A brief reference to whether freight rates should be structured to subsidize the shipment of recyclable commodities is so entwined with this jurisdictional discussion that the comment is virtually lost (A. at 145).[37]

Those commenting on the draft environmental impact statement raised the question of whether there were other means of allocating the railroad's revenue need than the manner selected. Rather than evaluate the implications of this alternative, the suggestion is simply rejected by the Commission without the necessary discussion (A. at 145-6).

The ICC notes that investigation and suspension proceedings provide one means of testing the appropriateness of particular rates (A. at 147-8) but does not analyze whether this type of proceeding could be utilized to investigate effectively the issues which it claims are inappropriate in general rate proceedings. An affi-

[37] The so-called "Alternatives" section also contains a restatement of the ICC's defense of its general rate decision (A. at 153). This constant movement from topic to topic contributes to the confusing nature of the environmental impact statement and is evidence of the ICC's lack of systematic approach to environmental problems required by Section 102(2)(A) of NEPA.

davit of Dr. Herschel Cutler included in the record below avers that no adequate remedy is available to ferrous scrap shippers. This is because the investigation and suspension proceeding, based upon an allegation of discrimination under Sections 3 and 13 of the Interstate Commerce Act, poses an intolerable burden on shippers.[38] The impracticality of such a vehicle should have been weighed by the ICC in its determination of alternatives to its proposed course of action.

As the Commission freely concedes in its general discussion of rate characteristics, not all commodities bear their full burden in supplying needed revenues (Gov. J.S. at 36d). An analysis of ways of equalizing this burden should have been included in the environmental impact statement, even if these methods of equalization might necessitate recommendations to Congress to limit prior transportation policy directives. It is incumbent upon the ICC to clarify its analysis as to the appropriate manner of reallocating any unfair burden now imposed upon recyclable commodities. This is not to suggest that the ICC must adopt such a reallocation, but that at a minimum, the ICC must make the attempt to define this alternative. Only if this is done can satisfaction of NEPA's Section 102 (2)(D) requirement that the ICC have before it and take into proper account all proper approaches to a particular project be insured. *Calvert Cliffs' Coord. Comm., supra,* 449 F.2d at 1114.

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[38] This affidavit was attached to Appellee Institute of Scrap Iron and Steel's Motion for Summary Judgment. Relevant excerpts from this affidavit are attached in the Appendix to this brief at 2a. It is significant to note that the Government characterizes general revenue proceedings as beneficial to "the Commission, the railroads, and the public" (Gov. Br. at 22). This reference, pointedly, does not include shippers.

5. *Failure to Discuss Why No Holddown Was Granted on Ferrous Scrap When a Holddown Was Granted on All Other Recyclable Commodities.*

Despite the Commission's efforts to minimize its role in general revenue proceedings, its role clearly is substantial. The ICC exerts its influence on rate increases proposed by the railroads by means of holddowns—authorization of rate increases of amounts or percentages less than these proposed. In Ex Parte No. 281, the ICC authorized holddowns in 29 separate exceptions.[39] While the general rate increase approved in this proceeding would approach a "theoretical" 4% (Gov. J.S. at 2d), the Commission itself notes that the effective rate of increase must reflect an 82% "effectiveness factor" (Gov. J.S. at 8d).

The Commission permitted the requested holddown on iron ore (341 ICC 298 at 392) and mandated a holddown on all recyclable commodities but ferrous scrap (Gov. J.S. at 86d). The holddown on other recyclables was justified in part on the ground that "This limitation will also have a beneficial effect upon the environment." (Gov. J.S. at 60d.) In addition, the Commission observes that "the holddown here imposed should encourage the movement and recycling of these commodities." (*Id.*)

The environmental impact statement fails totally to explain either the reasons for, or the impact of, discriminatory treatment of ferrous scrap vis-a-vis other recyclables on one hand and iron ore on the other. Nor does it explain how it can conclude that a holddown would encourage the recycling of all secondary commodities except ferrous scrap or that a similar holddown would not encourage iron and steel scrap

[39] The ICC list of holddowns is set forth in the Commission's order of October 4, 1972. (Gov. J.S. at 85d-86d.)

recycling. This discrepancy was pointed out to the Commission by numerous commentators,[40] but to no avail.

6. *Failure to Hold a Hearing on the Draft Impact Statement.*

One final factor considered by the lower court in its assessment was the reasonableness of the ICC's refusal to hold a hearing on the draft environmental impact statement. In proposed guidelines issued prior to the ICC's final environmental impact statement, the CEQ outlined its view as to when hearings are required:

> "In deciding whether a public hearing is appropriate, an agency should consider: (1) The magnitude of the proposal in terms of economic costs, the geographic area involved, and the uniqueness or size of commitment of the resources involved; (2) the degree of interest in the proposal, as evidenced by requests from the public and from Federal, State and local authorities that a hearing be held; (3) the complexity of the issue and the likelihood that information will be presented at the hearing which will be of assistance to the agency in fulfilling its responsibilities under the Act; and (4) the extent to which public involvement already has been achieved through other means, such as earlier public hearings, meetings with citizen representatives and/or written comments on the proposed action." 40 CFR § 1500.7(d).

The lower court considered the lack of a hearing as one further factor in evaluating the reasonableness of the ICC's compliance with NEPA. The court concluded that NEPA required that an environmental

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[40] CEQ letter of October 30, 1972 to the ICC (A. at 569); EPA letter of October 30, 1972 to the ICC (A. at 574); and Comments of the Institute of Scrap Iron and Steel on the draft impact statement (A. at 609).

impact statement be considered in the existing agency review process [41] and continued:

> "In this case, when the general rate increase was first being considered without an impact statement, oral hearings were held before the Commission. This fact at least *establishes a strong presumption for us that full consideration of the revised impact statement through 'existing agency review processes' must entail oral hearings before the Commission.*" (Emphasis added) 371 F.Supp. at 1307 (Gov. J.S. at 42a-43a).

The pressing need for such scrutiny at an oral hearing is emphasized by the ICC itself where, in its October 4, 1972 order, it singled out "testimony adduced at the oral hearings" as the particularly important element in its review of the entire record.[42]

The Court of Appeals for the Second Circuit, in *Greene County Planning Board* v. *FPC,* 455 F.2d 412 at 422 (2d Cir. 1972), held:

> "[S]ince the [environmental impact] statement may well go to waste unless it is subject to the full scrutiny of the hearing process, we also believe that the intervenors must be given the opportunity to cross-examine . . . witnesses in light of the statement."

That court recently chose to apply the principle enunciated in *Greene County* to the ICC in another proceeding in which the ICC had failed to hold a hearing on an environmental impact statement, saying:

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[41] Although the Commission asserts that hearings may not be required for all proceedings under Section 15(7) (*See* Gov. Br. at 50, n.20), all general revenue proceedings from 1958 through Ex Parte No. 281, have included oral proceedings allowing cross-examination and oral argument. *See* Ex Parte No. 212, 304 ICC 289 (1958); Ex Parte No. 223, 311 ICC 373 (1960); Ex Parte No. 256, 329 ICC 854 (1967), 332 ICC 280 (1968); and Ex Parte No. 259, 332 ICC 590 (1968), 332 ICC 714 (1969).

[42] Report of October 4, 1972, 341 ICC 290 at 332 (Gov. J.S. at 39d).

> "[T]he ICC ignores that we held in *Greene County I* that the literal language in NEPA requires that impact statements be prepared prior to hearings since the statement must 'accompany the proposal through the existing agency review process.'" *Harlem Valley Transportation Ass'n* v. *Stafford*, 500 F.2d 328 at 336 (2d Cir. 1974).

Similarly, the court below was correct in holding that the oral hearings in Ex Parte No. 281 were part of the existing agency review process at which the environmental impact statement should be subject to scrutiny.

D. Reliance by the Lower Court on the Conclusions of Other Federal Agencies with Respect to the Inadequacies of the ICC Environmental Impact Statement Was Appropriate.

The lower court's conclusion that the ICC environmental impact statement was inadequate rested in significant part on the opinions expressed by other federal agencies throughout the Ex Parte No. 281 proceeding with respect to the Commission's non-compliance with NEPA. Both EPA and CEQ are on record throughout the course of this proceeding recommending the steps necessary for ICC compliance and, subsequently, observing that the Commission had taken neither these steps nor any others which satisfied the requirements of NEPA. Acceptance by the lower court of the conclusions of other federal agencies—especially those with far greater expertise in compliance with NEPA than the ICC—certainly was reasonable.

On October 30, 1972, CEQ wrote to the ICC objecting to the Commission's October 4, 1972 order as follows:

> "[T]he Council feels that the basic environmental issues related to the existing freight rate structure and changes thereto, must be evaluated in a logical, analytical and timely fashion in compliance with the requirements of the National Environmental Policy Act. *The Commission's actions to date ap-*

pear to be inconsistent with the objectives of NEPA, and the *analyses undertaken to date by the Commission appear to offer an inadequate basis from which to draw conclusions concerning the impact of freight rates on recycling and environmental quality. . . .*" (Emphasis added) (A. at 570.)

EPA also protested to the ICC along similar lines.[43] Both agencies attached detailed critiques of the ICC position to these letters.[44]

Commenting on the draft environmental impact statement circulated March 5, 1973, the U.S. Department of Commerce observed:

> "We believe the conclusion cited in the summary sheet and on page 190 of the impact statement that the action taken in this proceeding will not have a significant adverse impact upon the quality of the human environment raises an important question about the purpose of the statement. The National Environmental Policy Act (NEPA) as quoted on page 11 (i.e., Section 102(2)(C)) requires that the statement set forth as fully and clearly as possible precisely what the environmental impact will likely be. *Simply giving the Commission's judgment on the issue without in-depth supporting documentation is insufficient.* We suggest, accordingly, that the final environmental impact statement give more attention to this issue and less to justifying

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[43] By letter of October 30, 1972, EPA observed that: "Although we are aware that the issues involved are extremely complex and require correspondingly extensive research and analysis, the impact statement process would seem to be an appropriate vehicle for such studies. On-going investigations by this Agency indicate that there is reason to believe that rate increases on secondary materials may curtail their movement with resultant adverse environmental impacts. *We therefore cannot support the Commission's proposed action on rate increases for secondary materials, scrap steel, and returnable containers.*" (Emphasis added) (A. at 572-3.)

[44] CEQ, Attachment A. 570-1; EPA, Critique A. 573-4.

a contemplated rate-making action." (Emphasis added) (A. at 576.)

The General Services Administration offered extensive comments on the draft statement, concluding:

> "*GSA believes the conclusions expressed* by the Commission in its Draft Environmental Impact Statement *are,* as hereinabove described, *inconsistent with its findings respecting the movements of individual solid waste materials.*" (Emphasis added) (A. at 606.)

The Department of Interior conclusions with respect to the draft impact statement also are critical of the ICC effort:

> "The revised draft is greatly expanded compared to that submitted last year; even so, the fundamental posture of the statement, in our judgment, remains unchanged. *The impact statement does not appear to us to meet the requirements of Section 102(2)(C) of the National Environmental Policy Act for providing a careful multi-disciplinary examination of environmental effect.*" (Emphasis added) (A. at 702.)

The two agencies most directly authorized by Congress to develop an expertise in environmental matters and to insure incorporation of environmental values in Federal agency actions renewed earlier criticisms. CEQ observed:

> "We feel, however, that there are several respects in which the present statement could be significantly improved by greater objectivity in the Commission's evaluation of the potential impact of its action on the environment.
>
> "Among the issues which we feel have not been adequately addressed, are the following:
>
> 1. While we would certainly agree that the mere existence of rate differences does not imply rate discrimination, the Commission does not demonstrate that these differentials are justified by inherent cost differences or other factors.

2. In our letter of October 30, 1972, we pointed out the deficiencies of the Commission's approach to the question of the impact of rate changes on scrap consumption. The deficiencies have not been corrected. For example, the Draft Environmental Impact Statement ignores completely the very important consideration of how freight rates might affect long-run decisions on investment in scrap-intensive production facilities, such as electric arc furnaces.

3. The Commission has devoted little effort to analyzing alternative actions within its jurisdiction. We also find it difficult to believe, for example, that the economic well-being of the nation's railroads is really at stake here. Are there no other rate schemes that could provide the same revenues, without increasing or even maintaining rate differentials which might adversely affect environmental quality?" (A. at 705-6.)

Finally, EPA specifically classified the ICC's draft environmental impact statement as inadequate, concluding that:

> "The draft EIS does not adequately assess the environmental impact of the proposed freight rate increases on the movement of secondary materials, nor does it consider in reasonable detail the range of alternatives to the proposed action." (A. at 707.)

Rather than respond to these comments or attempt to meet the issues raised,[45] the ICC merely noted the existence of these objections and summarily rejected them without any reasoned analysis.

Acceptance by the lower court of these conclusions of every other Federal agency commenting on the

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[45] The changes made in the draft environmental impact statement before it was released in final are minimal, reflecting the Commission's view that the draft statement "was complete when issued." *See* discussion, *supra*, at p. 26.

ICC's efforts under NEPA clearly was reasonable and should not be overturned by this Court.

E. Unique Nature of Instant Case.

In reviewing the decision of the lower court, it is important to note several unique factors involved in this case. First, the confrontation in NEPA cases has usually been between environmental groups and occasionally economic interests on the one hand, and a Federal agency on the other. However, the normal skepticism which might be exhibited toward criticism of an agency impact statement because of the potential tendency to seize on every flaw and to emphasize its importance is not appropriate here. In the present proceeding, the most compelling and persistent criticism of the ICC's efforts to comply with NEPA come from *five other federal agencies*—the Environmental Protection Agency, the Council on Environmental Quality, the Departments of Interior and Commerce, and the General Services Administration. The lower court's similarly critical judgment reinforces the critiques of the federal agencies of the statement.[46]

Second, the remedy fashioned by the lower court has the relatively unique attribute of maintaining the status quo so as not to impair the legal rights of the economic interests involved in the litigation without in any way hindering the ICC in its administration of the Interstate Commerce Act or impairing the financial

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[46] The Ninth Circuit observed in *Lathan, supra*, 7 ERC at 1058: "As Mr. Justice Frankfurter said in a criminal case, in words that are equally applicable to the actions of administrative agencies: 'The history of liberty has largely been the history of observance of procedural safeguards.' *McNab v. United States*, 1943, 318 US. 332, 347. So it may also be with the history of environment. *See also, Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n*, D.C.Cir., 1971, 449 F.2d 1109, 1114-5; *Silva v. Lynn*, 1 Cir., 1973, [5 ERC 1654] 482 F.2d 1282."

health of the railroads.[47] The ICC has and can continue to permit general freight rate increases to be collected by the railroads.[48] The Government's assertion that the lower court's ruling would force the ICC "to abandon general revenue proceedings altogether" (Gov. Br. at 41) obviously is hyperbole and disproved by ICC actions subsequent to the court's decision.[49]

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[47] The prosecution by shippers of their rights is one method by which the interests of the environmental groups can be protected. To the extent that these shipping interests are better able to protect their interests, the cause of the environmentalists likewise is enhanced.

[48] It is not necessary for the ICC to approve the tariffs before they may go into effect. So long as the ICC has not suspended rates pursuant to Section 15(7) of the Interstate Commerce Act or disapproved those rates during any suspension period, railroads are permitted to impose these tariffs. As this Court noted in *Arrow Transp. Co.* v. *Southern Ry. Co.*, 372 U.S. 658 at 659-60 (1963):

> "[t]he statute (footnote omitted) expressly provides that 'the proposed change of rate . . . shall go into effect,' if the Commission's proceeding has not been concluded and an order made within the period of suspension."

The ICC itself concedes in its Jurisdictional Statement that the only effect of the lower court's order is to prevent the "shift [of] the burden of proof concerning the reasonableness of individual rates that comply with the order from the carrier to the shipper." (Gov. J.S. at 13.)

This Court recognized the implications of this burden of proof shift last term in *Atchison, Topeka & Santa Fe Ry. Co.* v. *Wichita Board of Trade, supra*, 412 U.S. at 812-6, and, thus, approved the suspension of the ICC's order in that case by the lower court so "that the railroads may not rely, in some subsequent proceeding, on a Commission finding that the proposed rates were just and reasonable." 412 U.S. at 818.

[49] Since the lower court's decision in the instant case, the ICC has permitted general rate increase of 3% with exceptions (Ex Parte No. 295); 2.8% (Ex Parte No. 299); 4% (Ex Parte No. 303); and 13.3% with exceptions (Ex Parte No. 305, embracing Ex Parte No. 301).

CONCLUSION

These appeals should be dismissed for want of jurisdiction under 28 U.S.C. § 1253. Alternatively, the judgment of the lower court should be affirmed.

Respectfully submitted,

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APPENDIX

28 U.S.C. § 2201 provides:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Section 13(1) of the Interstate Commerce Act, 49 U.S.C. § 13(1) provides:

> Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Excerpt from Affidavit of Herschel Cutler Filed with Motion for Summary Judgment of Plaintiff-Intervenor Institute of Scrap Iron and Steel, Inc.

No practical remedy exists for ISIS members to challenge individual freight rates which they believe discriminate against iron and steel scrap and in favor of iron ore for the following reasons:

(a) In order for such a discrimination challenge to be made under Section 13 of the Interstate Commerce Act it is thought necessary to compare each existing iron and steel scrap freight rate with a comparable rate for iron ore.

(b) At least 100,000 distinct railroad freight rates for iron and steel scrap are known to exist.

(c) Establishing comparable ore rates for each of these 100,000 scrap rates would be an extremely expensive and time-consuming task as well as a most difficult conceptual undertaking requiring the proof of comparability, and would impose a tremendous burden on ferrous scrap shippers.

Iron and steel scrap shippers are generally small entrepreneurs. They do not have the financial resources to establish the comparative rate data or to undertake the proceedings necessary to challenge what they may believe to be unjustly discriminatory freight rates under existing ICC requirements.

MAR 18 19
MICHAEL RODAK, JR.

No. 73-1966

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

ABERDEEN AND ROCKFISH RAILROAD COMPANY, *et al.*,
Appellants,

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF OF THE ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL.

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March 1975

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28 U.S.C. § 2321 12
28 U.S.C. § 2325 .....7, 8, 12
62 Stat. 689 7

Miscellaneous:

Burstein, "Judicial Review of ICC Orders," 38 *ICC Pract. J.* (1971) 8
C. Wright, *Federal Courts* (2d ed. 1970) 8
H.R. Rep. No. 93-1569, 93rd Cong., 2d Sess. (1974) ... 12
Stern & Gressman, *Supreme Court Practice* (1969)... 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1966

ABERDEEN AND ROCKFISH RAILROAD COMPANY, *et al.*,
Appellants,

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF OF THE ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL.

In their answering briefs,[1] appellees suggest for the first time that the present controversy is "academic" (see p. 2, below); and, alternatively, they object to this Court's jurisdiction to review the merits of the lower court's decision. As we show below, both objections are without foundation and this Court presumably rejected the objection to its jurisdiction months ago. In any event, if this case were moot or this Court

[1] This reply is directed to the answering briefs filed by SCRAP and EDF, *et al.* ("SCRAP-EDF"); ISIS ("ISIS"); and NARI, *et al.* ("NARI").

did lack jurisdiction, the consequence would not be affirmance of the judgment below or dismissal—as appellees assume—but rather an order by this Court vacating the judgment below and remanding with instructions.

There is in fact a major jurisdictional issue at the threshold of this case, but it concerns the jurisdiction of the District Court rather than this tribunal. As the railroads showed in their opening brief, the District Court lacked jurisdiction to review general revenue orders, particularly where (as here) the challenge is fundamentally directed at rates on particular commodities rather than the railroads' general revenue needs. Appellees have no persuasive answer to this jurisdictional objection.

Finally, on the merits, appellees' attacks on the Commission's lengthy and detailed environmental impact statement do not justify the District Court's decision. On the contrary, they merely confirm that, if the sweeping and untempered judicial review of impact statements utilized by the District Court is sustained, virtually no impact statement could be found sufficient. Here, the adequacy of the present impact statement is confirmed by appellees' own repeated reliance on subsequent ICC impact statements which reached the same ultimate conclusion as the impact statement sought to be condemned.

I. APPELLEES' CLAIMS THAT THE CASE IS MOOT OR THAT THE DISTRICT COURT ORDER IS NOT APPEALABLE ARE WITHOUT MERIT AND DO NOT, IN ANY EVENT, WARRANT AFFIRMANCE OR DISMISSAL OF THE APPEAL.

1. Throughout SCRAP-EDF's brief, there is a recurring *leitmotiv* that the effect of the District Court's decision is "academic" (SCRAP-EDF Br. 4), "nil"

(*id.* 5), "inconsequential" (*id.* 27), or "moot" (*id.* 78) in some nontechnical sense.[2] Although the railroads believe the Court may decide this case without reaching the merits—by disposing of it on the jurisdictional grounds which the railroads have pressed in their opening brief—there is no merit to the appellees' contention that the District Court decision was or is now in any sense hypothetical or academic.[3] In fact, that decision ordered the reopening of *Ex Parte No. 281* for further proceedings and gave detailed instructions to the Commission as to the preparation and contents of a new impact statement upon remand. The District Court ordered the Commission to "prepare another

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[2] SCRAP-EDF claim that "[w]hile this case may not be moot in the technical sense, its connection with the real world is tenuous, and likely to become more so." SCRAP-EDF Br. 78. It is unclear whether ISIS, which incorporates by reference several of the comments made in the SCRAP-EDF brief (see ISIS Br. 3), joins SCRAP-EDF in making this suggestion.

[3] This is the third time in the course of this litigation that one or more of the appellees have suggested that a railroad appeal to this Court should be dismissed as moot. In the fall of 1972, SCRAP urged that the railroads' appeal be dismissed as moot when the railroads appealed from the lower court's original injunction directed against the interim emergency surcharge as applied to recyclable commodities. See SCRAP's "suggestion of mootness" contained at pp. 12-15 in SCRAP's motion to dismiss or affirm, December 1972. This Court, of course, rejected the suggestion of mootness, noted probable jurisdiction and thereafter reversed the lower court's injunction. *United States* v. *SCRAP*, 412 U.S. 669 (1973). Again, in the fall of 1973 in their motions to dismiss the railroads' appeal from the District Court's preliminary injunction issued in June 1973, the appellees argued that the appeal was moot. See motions to dismiss submitted by SCRAP, EDF, ISIS, NASMI, *et al.*, September and October 1973. This Court again rejected appellees' arguments and instead vacated the District Court's injunction and remanded for further consideration in light of *Atchison T. & S. F. Ry.* v. *Wichita Board of Trade*, 412 U.S. 800 (1973). 414 U.S. 1035 (1973).

draft statement to be circulated as specified by Section 102(2)(C) [of NEPA]" (371 F. Supp. 1306 (Gov. J.S. 39a)); it stated that the "new statement must include an analysis of the underlying rate structure's impact on the movement of recyclable commodities" (*id.*), as well as "an analysis of the effects of the rate structure on investment in manufacturing facilities which can make intensive use of scrap" (*id.* (Gov. J.S. 40a)); it noted that "[a] comprehensive study of the contribution to costs made by each category of recyclable commodities and the primary goods with which they compete will . . . probably be necessary" (*id.* (Gov. J.S. 41a)); and it ordered the preparation of a new final statement. *Id.*

While the claim of mootness thus appears to be frivolous, it would not, even if accepted, warrant the relief sought by appellees—affirmance or dismissal of the appeal. When a case becomes moot on appeal from a judgment of a lower court, then "the established practice of the Court . . . is to reverse or vacate" the judgment below. *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950). As the Court explained in that case, citing numerous supporting precedents:

> "The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss. That was said in *Duke Power Co.* v. *Greenwood County,* 299 U.S. 259, 267, to be 'the duty of the appellate court.' That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happen-

> stance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary." 340 U.S. at 39-40 (footnote omitted).

This rule is based on elementary fairness since a litigant cannot properly be subject to the effects of a judgment and yet be deprived of its statutory right to obtain appellate review.

In short, if this case were deemed moot by the Court, then the only appropriate course would be to vacate the District Court's judgment with instructions to dismiss. If the present controversy were academic or moot, the ICC should clearly not remain subject to an outstanding obligation to prepare a new impact statement in this proceeding, as it would be if this Court affirmed the lower court's judgment.

2. Appellees renew the same objections to this Court's jurisdiction that they previously raised in their motions to dismiss. The railroads' reply to appellees' motions demonstrated the lack of merit in these objections. R. R. Reply 1-15. The railroads believe that this Court has already rejected appellees' arguments by noting probable jurisdiction in this appeal. Thus, if the Court had harbored any doubts regarding its own jurisdiction, it would instead have postponed jurisdiction to the merits.[4] Nevertheless, for the convenience of the Court, the railroads will

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[4] See, *e.g.*, *Cramp* v. *Board of Public Instruction*, 366 U.S. 934 (1961); *United States* v. *Hancock Truck Lines*, 324 U.S. 774, 776 (1945) (jurisdiction postponed on appeal from order of three-judge court enjoining ICC order). See also Stern & Gressman, *Supreme Court Practice* 237-38 (1969).

summarize their position on the issue while referring the Court to the railroads' earlier reply for a fuller treatment of the question.

Appellees' position that this Court lacks jurisdiction from an appeal of an order of a three-judge court vacating an ICC order is based on a purported distinction between actions to "enjoin" ICC orders and all other actions seeking directly to invalidate such orders. Their contention, however, is inconsistent with the legislative history of the statutes in question; it is contradicted by decades of settled practice in this Court; it is contrary to the views of commentators and to the understanding of Congress; and the same contention was fully briefed and flatly rejected by this Court just a few years ago.

The legislative history of the pertinent statutory provisions buttressed by years of consistent practice in this Court shows that Congress intended from the outset that orders of the ICC would be reviewable by three-judge district courts and that orders of such courts invalidating (or refusing to invalidate) the ICC's orders would be subject to direct appeal to this Court. Furthermore, Congress intended these requirements to apply whenever direct review of ICC orders was sought and without regard to whether the district court's own order was styled as an order "enjoining" the agency's order, setting it aside, or invalidating it in any other equivalent terms.

Since the adoption of the Urgent Deficiencies Act of 1913, orders of the Commission, except those for the payment of money, have been reviewable by three-judge district courts and orders of these courts have

been directly appealable to this Court. That Act provided, in pertinent part:

> "No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any orders made or entered by the Interstate Commerce Commission shall be issued or granted . . . unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges. . . . An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case . . . *and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply.*" 38 Stat. 220 (emphasis supplied).

Plainly, under this language a suit such as the present one, which resulted in setting aside orders of the ICC, would require a three-judge district court and the district court's order granting or denying relief would be subject to direct review in this Court.

In 1948, as part of the revision of Title 28 and its enactment into positive law (62 Stat. 869), the Urgent Deficiencies Act provisions in pertinent part were codified into Sections 2325 and 1253. The reviser's notes make it patent that there was no intent whatever to alter the meaning, scope and purpose of the prior provisions so far as concerns the three-judge court requirement for review of ICC orders and the provision for direct review in this Court.[5] Since the reviser's

[5] The reviser's note to Section 2325 discloses *inter alia* that it derived from "title 28, U.S.C., 1940 ed., § 47, Oct. 22, 1913, ch. 32, 38 Stat. 220)," which is the Urgent Deficiencies Act, and that

notes are authoritative in the construction of the 1948 revision,[6] the construction here of Sections 2325 and 1253 is governed by the long-standing principle of *United States* v. *Ryder,* 110 U.S. 729, 740 (1884), that "[i]t will not be inferred that the legislature, in revising and consolidating the laws, intended to change their policy, unless such intention be clearly expressed."

For years, the jurisdiction of this Court in cases such as the present one has been accepted as settled by this Court, by commentators, by Congress and by the ICC itself. See, *e.g., Chicago, M., St. P. & P. R.R.* v. *United States,* 366 U.S. 745, 746 (1961); *Schaffer Transp. Co.* v. *United States,* 355 U.S. 83, 87 (1957); C. Wright, *Federal Courts* 191 (2d ed. 1970); Burstein, "Judicial Review of ICC Orders," 38 *ICC Pract. J.* 174, 181 (1971). Appellees' suggestion that this represents no more than the casual assumption of several commentators is plainly unpersuasive. Indeed, it appears that this Court only recently determined, in the course of deciding *Electronic Industries Ass'n*

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the provision for direct appeal to the Supreme Court in three-judge cases was located in Sections 1253 and 2101 (which fixes the time for appeal). The reviser's note to Section 1253 states pertinently that "[t]his section consolidates the provisions of sections 47, 47a, 380, and 380a of title 28, U.S.C., 1940 ed. relating to direct appeals from decisions of three-judge courts involving orders of the Interstate Commerce Commission or holding State or Federal laws repugnant to the Constitution of the United States." Nothing in the reviser's notes shows any intent whatever to vary the scope of cases involving ICC orders to which the three-judge requirement or direct appeal provisions apply.

[6] *United States* v. *National City Lines,* 337 U.S. 78, 81, 82 (1949); *Stainback* v. *Mo Hock Ke Loc Po,* 336 U.S. 368, 376 n.12 (1949).

v. *United States,* 401 U.S. 967 (1971), that there was no jurisdictional difference between an action to enjoin and an action to set aside an ICC order.[7]

Appellees argue that no direct appeal to this Court lies from the District Court's order invalidating the ICC's orders, and requiring the Commission to undertake proceedings specified by the lower court's detailed mandate, because no "injunction" has been issued. SCRAP-EDF Br. 20-28; ISIS Br. 5-9; NARI Br. 22-24. But the force of this argument depends on establishing the prior proposition that, for purposes of this Court's jurisdiction, the form of the District Court's own order—*i.e.,* whether it is styled as an order enjoining the agency order, setting it aside or invalidating it in any equivalent terms—is determinative. Appellees simply ignore the clear legislative history, the consistent practice of this Court, and the *Electronic Industries* decision—all of which demonstrate that no such distinction exists and that orders invalidating ICC orders are reviewable here however they may be couched.[8]

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[7] While the *Electronic Industries* case was pending, this Court directed the parties to submit supplemental memoranda on two questions which in substance posed the issue whether a suit to enjoin ICC orders is precluded by the availability of a suit to set them aside and, if so, whether the latter suit would have to be tried to a three-judge district court. Citing the legislative history summarized above, all parties to the case submitted memoranda agreeing that there was no pertinent distinction between actions to enjoin and actions to set aside ICC orders and that such actions were in both instances subject to the three-judge court requirement. This Court then unanimously affirmed the District Court's judgment by an eight-to-zero vote, necessarily acknowledging its jurisdiction over the appeal.

[8] Appellees' argument is not unlike an argument which they advanced, and this Court rejected, when appellees sought to avoid

Appellees also argue that at the very least, this Court's jurisdiction on direct appeal is limited to situations in which the lower court's order had "a necessary, coercive impact on what some party could or could not do, *or* was accompanied by the court's granting, or refusing to grant, an order which would have coerced directly some action or inaction of a party." ISIS Br. 7 (emphasis in original); see also SCRAP-EDF Br. 26-27. A short answer to appellees' argument is that the District Court's order has an unmistakable "coercive impact" on the ICC. See pp. 3-4, above. Moreover, none of the cases cited by appellees (ISIS Br. 6-7) to show that "coercion" is the touchstone of Supreme Court jurisdiction even remotely suggested the rationale now proffered by appellees. Finally, this Court has in fact entertained an appeal from the decision of a three-judge district court under 28 U.S.C. § 1253 that itself did no more than determine that certain ICC orders were unreviewable. *Frozen Foods Express* v. *United States*, 351 U.S. 40 (1956).[9]

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review here of the District Court's preliminary injunction issued in June 1973. Because the injunction was captioned "temporary restraining order," appellees argued that this Court had no jurisdiction to review it. *E.g.*, memorandum of SCRAP-EDF in opposition to stay, pp. 2-3. The railroads responded, consistent with the precedents, that the District Court's order was clearly a preliminary injunction (however it might be denominated) because it was issued after a hearing and without the ten day limit applicable to TRO's. This Court not only issued the stay but thereafter accepted jurisdiction and vacated the District Court's order. 414 U.S. 1035 (1973).

[9] Since the ICC orders which the three-judge district court held unreviewable were themselves characterized by this Court as "declaratory," 351 U.S. at 44, this Court thus assumed jurisdiction of an appeal under 28 U.S.C. § 1253 which would determine only whether a three-judge district court's "non-coercive" refusal to review a "non-coercive" ICC order was appropriate.

Appellees rely heavily upon decisions construing the statutory provisions involving injunctions against unconstitutional statutes.[10] Both the legislative development of these latter provisions and the policies underlying them are different from those relating to the review of ICC orders. Whereas the legislative history of the provisions relating to ICC orders shows that they were designed to embrace actions to invalidate ICC orders however the actions might be denominated, the legislative history of the provisions relating to unconstitutional statutes shows that they have always been couched to embrace only actions seeking injunctive relief. *See, e.g.*, 36 Stat. 557; *Kennedy* v. *Mendoza-Martinez, supra*, 372 U.S. at 154-55.

Lastly SCRAP-EDF and NARI suggest that a restrictive interpretation of the direct review statute relating to ICC orders will lighten this Court's caseload. SCRAP-EDF Br. 24; NARI Br. 24. However, even this policy argument has been vitiated by P.L. 93-584, 88 Stat. 1917 (Jan. 2, 1975), which transfers initial jurisdiction over suits to enjoin or suspend ICC orders to the courts of appeals, but which specifically provides that suits already filed shall proceed under "existing" law. The legislative history of the recent amendments shows clearly that Congress understood that under "existing" law decisions of three-judge courts reviewing ICC orders were appealable directly to this Court:

> "Since 1913, with the adoption of the Urgent Deficiencies Act, orders of the Commission—except

[10] *E.g., Public Service Comm'n* v. *Brashear Freight Lines, Inc.*, 306 U.S. 204 (1939); *Mitchell* v. *Donovan*, 398 U.S. 427 (1970); *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963); *Gunn* v. *University Committee to End the War*, 399 U.S. 383 (1970); *Phillips* v. *United States*, 312 U.S. 246 (1941); *Rorick* v. *Board of Comm'rs*, 307 U.S. 208 (1939).

> those calling solely for the payment of money—have been reviewed in the United States district courts by panels of three judges, at least one of whom must be a judge of the court of appeals for the circuit in which the district is located. 28 U.S.C. §§ 2321, 2325. Appeals from three-judge courts lie directly to the Supreme Court as a matter of right." *H. R. Rep.* No. 93-1569, 93rd Cong., 2d Sess. 2 (1974).

See also R.R. Reply 4.[11]

II. THE DISTRICT COURT LACKED JURISDICTION TO REVIEW THE COMMISSION'S GENERAL REVENUE ORDERS.

In their opening brief, the railroads demonstrated that the long-standing rule establishing the unreviewability of general revenue orders precluded judicial review of the Commission's orders in this case, and that NEPA created no exception to this rule. R.R. Br. 21-30. They further pointed out that despite the even division of this Court over the reviewability of general revenue orders when challenges to such orders were directed at Commission findings of general revenue need applicable to *all rates*,[12] the Court soon thereafter

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[11] Finally, while the clear propriety of review in this Court makes the point academic, it should be noted that appellees would not on any view of the matter be entitled to dismissal of the appeals as they request. SCRAP-EDF Br. 80; ISIS Br. 46; NARI Br. 54. Even if this Court decided that the District Court's order here was not directly appealable to this Court, the usual remedy would be to "vacate the judgment below and remand the case" so that the District Court could enter a new order and afford appellants the opportunity to take a timely appeal to the Court of Appeals. *Mitchell* v. *Donovan, supra,* 398 U.S. at 431-32 & n.4.

[12] *Alabama Power Co.* v. *United States,* 316 F. Supp. 337 (D. D.C. 1970) and *Atlantic City Elec. Co.* v. *United States,* 306 F. Supp. 338 (S.D.N.Y. 1969), *both aff'd by an equally divided Court,* 400 U.S. 73 (1970).

unanimously affirmed a decision sustaining the dismissal of a suit challenging a general revenue order where the attack was directed not to revenue-need findings but to the application of the general increase to particular categories of rates. *Electronic Industries Ass'n* v. *United States,* 401 U.S. 967 (1971).

The present case is essentially identical to the latter situation. The appellees' claims concern the Commission's treatment of particular categories of rates applicable to recyclable commodities,[18] just as the claims in *Electronic Industries* concerned the Commission's treatment of particular categories of rates applicable to electrical products. *Electronic Industries* therefore is dispositive of this case on the jurisdictional issue, whether or not the Court might otherwise decide to reexamine the general rule followed in the district courts for many years as it was presented in *Atlantic City* and *Alabama Power.* In light of this controlling precedent, it is nothing short of extraordinary that SCRAP-EDF and ISIS fail even to cite the *Electronic Industries* case in their briefs, and that NARI casually lists it in a string of citations it claims are "inapposite." NARI Br. 26.

Appellees likewise fail to consider the underlying reasons for the rule, which include an unwillingness of courts to interfere at what is merely an intermediate stage in the rate-making process, the availability of further remedies focusing upon individual rates, and the dangers of disruption and inconsistency that would result from review of general revenue orders. Indeed,

[18] They do not challenge the conclusions of the Commission with respect to rates on nonrecyclables that went into effect in October 1972. The specific categories of rates of interest to appellees were defined in the tariffs involved. See *Ex Parte No. 281,* 346 I.C.C. 88, 91 (1973).

this very case underscores the soundness of the general rule, for there has been no determination as to the justness or reasonableness of any particular rates on recyclables, and review of the Commission's orders at this juncture would cause the very interference with the administrative process that the rule was designed to avoid.

In the present case, the lower court's intervention, if sustained, would require the Commission to undertake elaborate and time-consuming tasks. As noted above, for example, the lower court would insist upon "an analysis of the effects of the rate structure on investment in manufacturing facilities which can make intensive use of scrap." 371 F. Supp. at 1306 (Gov. J.S. 40a). It would also require "[a] comprehensive study of the contribution to costs made by each category of recyclable commodities and the primary goods with which they compete." *Id.* (Gov. J.S. 41a). Studies of the scope and detail apparently envisaged by the District Court are extraordinarily complex and have no proper role in a general revenue proceeding, which is in substance designed to provide the railroads with prompt revenue relief, subject to subsequent challenges to individual rates that may be initiated by interested parties.

The impact of such judicial intervention at the general revenue stage not only complicates and delays the administrative process, but it also poses a threat of devastating delays for the railroads in obtaining essential revenue relief. Once this judicial intervention is permitted, an endless succession of studies will routinely be demanded from the Commission in the course of a general revenue proceeding. These demands will in turn inevitably result in substantial delays in desper-

ately needed rate increases.[14] The railroads in this country, faced with immense continuing cost increases in fuel, labor, materials and other cost elements, simply cannot carry the burden of significant additional delays in obtaining rate relief through general revenue cases. Given the existence of individual statutory proceedings in which a just and reasonable rate can be determined, taking account of all appropriate factors including environmental ones, there is no justification for instituting judicial review of general revenue orders.

In arguing for jurisdiction, appellees' briefs misstate the railroads' position and their arguments are, in any event, unpersuasive. SCRAP-EDF and ISIS erroneously contend that the railroads' argument is that a party seeking enforcement of the Commission's duty to prepare an impact statement in a general revenue proceeding "must first seek separate impact statements, rate-by-rate, in administrative reparation proceedings under 49 U.S.C. § 13(1), before he can assert any claim in court." SCRAP-EDF Br. 31. See also ISIS Br. 14. The railroads are not making and have never made such an argument. Rather the railroads have asserted, as is indisputable, that the justness and reasonableness of particular rates on recyclables can only be resolved in individual proceedings, and that it is in these proceedings that environmental determinations respecting recyclables should be reviewed. To the extent that the Commission may rely upon an earlier impact statement in support of its conclusion in a Section 13 proceeding, such a statement

[14] Such delay inescapably results both from district court injunctions, however mistaken—such as the lower court's two earlier injunctions in this case—and from the Commission's inability to complete general revenue proceedings expeditiously because of court-imposed requirements.

would be reviewable so far as it was pertinent. If instead the Commission chose to prepare and rely upon a new impact statement, the earlier statement would be either supplementary or irrelevant depending on the nature of the Commission's undertaking.

ISIS' brief (p. 16) echoes the decision below in arguing that the earlier cases establishing the general rule against reviewability of general revenue orders should not apply in NEPA cases. But the broad language of this Court's *SCRAP* opinion emphasized that nothing in NEPA or its legislative history reflected any congressional intent to alter the rule that the courts may not "suspend" rates by injunction when the Commission has chosen not to do so or when the statutory suspension period has expired. 412 U.S. 694-95. Similarly, nothing in NEPA or its legislative history bespeaks any intention to overturn the settled rule against judicial review either of suspension orders directed to individual rates or of general revenue orders directed to rates as a whole.

ISIS' brief (pp. 11-12) also relies upon the fact that the Government in *Alabama Power* and *Atlantic City* took the position—contrary to settled district court authority—that the revenue need findings in general revenue orders should be directly reviewable.[15] However, the Government's brief in those cases (p. 17) also stated that "the United States agrees with the Commission" that the complaints "do not state a claim for direct judicial review insofar as they challenge

[15] In explaining its position the Government's brief (p. 18) argued in part that such revenue need findings "involve no past or potential consideration of particular commodities" and that the "revenue decision . . . would not be considered further in any potential future proceeding challenging particular rates."

the Commission's preliminary treatment of rates on particular commodities."

Whatever else may be said, it is perfectly plain here that appellees' attacks do focus on particular commodity rates—namely, rates on recyclables—and do not challenge revenue need findings applicable to all rates. Any considerations bearing on the proper level of recyclable rates, including environmental considerations, can be urged in individual complaint proceedings,[16] and only in such proceedings can such rates be definitely fixed. Accordingly, the railroads submit that *Electronic Industries* governs this case and warrants reversal of the lower court's decision on jurisdictional grounds.

III. ON THE MERITS OF THE CASE, THE LOWER COURT ERRED BY SUBSTITUTING ITS JUDGMENT FOR THAT OF THE RESPONSIBILE AGENCY.

In their opening brief, the railroads contended that an examination of the Commission's elaborate and detailed impact statement would show that the Commission had given environmental considerations the "hard look" required by NEPA and that, even assuming substantive review of the impact statement was appropriate, the lower court's criticisms were ill-founded and went far beyond the permissible scope of review. R.R. Br. 34-48. The railroads' position represented no more than a particular application of well-settled principles of administrative law predicated on the necessity of

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[16] The Commission's own subsequent decisions both in general revenue cases and in other types of proceedings show that it is fully prepared to reconsider environmental claims directed to recyclables as new cases arise and new information becomes available. See pp. 24-27, below.

achieving a proper allocation of functions between expert agency and reviewing court.

In response, appellees take two different tacks. On the one hand, they attempt to rationalize the District Court's decision which ignored the basic principles of judicial review by engaging virtually in *de novo* consideration of matters entrusted to agency judgment. On the other hand, they seek to insulate the lower court's decision from the scrutiny of this Court on the remarkable ground that the lower court's review of the ICC's impact statement cannot be overturned unless it is found to be "clearly erroneous." Fed. R. Civ. P. 52(a). See SCRAP-EDF Br. 33-64; ISIS Br. 16-44; NARI Br. 26-51.

1. The underlying question which divides the railroads and appellees—and which has caused considerable confusion and uncertainty in the lower federal courts—is the appropriate scope of judicial oversight of an agency's preparation of an environmental impact statement. The railroads have urged that the scope of such review is and should be highly limited, and they have brought to this Court's attention well-reasoned opinions in the lower federal courts which have expressed this view. *E.g., National Helium Corp.* v. *Morton,* 486 F.2d 995 (10th Cir. 1973), *cert. denied,* 416 U.S. 993 (1974); *City of New York* v. *United States,* 344 F. Supp. 929 (E.D.N.Y. 1972) (Friendly, J.).

Appellees have cited other cases adopting varying formulations of the proper scope of review in language appellees apparently find helpful to their cause.[17]

[17] Curiously, the SCRAP-EDF brief (pp. 35, 46, 68) and ISIS brief (pp. 19-20) rely heavily on *National Helium Corp.* v. *Morton, supra,* although that case approved the very standard which

SCRAP-EDF Br. 36-41; ISIS Br. 17-20; NARI Br. 46-47. Yet the SCRAP-EDF brief concedes (p. 45) that " the adequacy or inadequacy of an environmental impact statement is not a legal question that can be decided *in vacuo.*" Whether one characterizes the legitimate role of a reviewing court in passing on an impact statement as assuring that the agency took a "hard look" at environmental factors,[18] that the agency made a "good faith" effort to comply with NEPA's requirements,[19] or that the agency's efforts be considered in light of a "rule of reason,"[20] none of these rubrics should permit a reviewing court in cases involving NEPA to reconsider, revise, and reject the agency's expert evaluation of the evidence before it and its expert judgments. If instead the reviewing court's function is circumscribed by the traditional limitations imposed on judicial review of agency action, then the District Court in this case could not properly invalidate the ICC's impact statement in *Ex Parte No. 281.*

As the railroads showed in detail in their opening brief, the Commission's impact statement represented a prodigious effort and the result was a detailed and carefully considered document. R.R. Br. 9-14. In 150 pages of analysis, the Commission considered each of the related topics specified by the statute. It examined the nature of the railroad rate structure and treated in

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the railroads have urged upon this Court: "an objective good faith effort to comply with the statutory procedural requirements." 486 F.2d at 1001.

[18] *National Resources Defense Council* v. *Morton,* 458 F.2d 827, 838 (D.C. Cir. 1972).

[19] *National Helium Corp.* v. *Morton, supra,* 486 F.2d at 1001.

[20] *Scientists' Institute for Public Information* v. *AEC,* 481 F.2d 1079, 1092 (D.C. Cir. 1973).

depth the question whether freight rate increases would have any effect on the movement of recyclables. Before issuing its final statement, it received and reviewed comments from other federal agencies and the public at large.

Appellees' criticisms of the ICC's efforts, like the lower court's criticisms, represent nothing more than expressions of their substantive disagreement with the ultimate conclusion reached by the Commission. For example, appellees recite at some length the critical comments made of the Commission's draft impact statement by other federal agencies (SCRAP-EDF Br. 49-54; ISIS Br. 26-28; NARI Br. 47-51) and chide the Commission for failing to heed them.[21] But these objections are simply particular substantive arguments that the rate changes will adversely affect the environment or demands for still further studies or analyses. Since the Commission believed that the record amply supported its conclusion that there would be no environmental impact, appellees' complaints are merely another way of saying that the Commission was required to alter the result it reached after a full consideration of the environmental facts and issues before it.

The appellees also complain about the Commission's alleged failure to consider the underlying rate structure based on appellees' claims that recyclable rates were discriminatorily high and that their cumulative impact required consideration. SCRAP-EDF Br. 58-64; ISIS Br. 32-34; NARI Br. 49-50. However, the Commission was entitled to devote principal attention to

[21] It is to be noted that the United States is before this Court supporting the ICC's environmental impact statement, and, of course, represents the combined interests of its agencies.

the particular federal "action" under consideration—namely, the impact (if any) of the particular general increases on recyclables involved in *Ex Parte No. 281*—since this focus is what NEPA's language contemplates. Moreover, the Commission in fact did consider the overall rate structure both in evaluating the cumulative impact of the rate changes here involved and in discussing charges that the rate structure discriminated against recyclables. See R.R. Br. 47-48.

Appellees' criticisms were to be expected in light of the fact, squarely recognized by one court, that it is "doubtful that any agency, however objective, however sincere, however well staffed and however well financed, could come up with a perfect environmental impact statement . . . ." [22] But the validity of an impact statement cannot be made to depend on an agency's ability to anticipate and refute every possible *post hoc* attack that can be leveled at it. If there are to be any sensible limits on the scope of review of impact statements prepared by federal agencies pursuant to NEPA, it is apparent that this Court should reject the lower court's *de novo* consideration of the Commission's extensive and thorough impact statement.

This Court has itself recognized that the "federal agencies . . . have the primary responsibility for the implementation of NEPA." *United States* v. *SCRAP, supra,* 412 U.S. at 694. The lower court's action represents a rejection of that principle; if allowed to stand, it will not only upset the intended division of resposibility between federal agencies and reviewing courts, but it will also be an open invitation to any party dis-

[22] *Environmental Defense Fund* v. *Corps of Engineers,* 470 F.2d 289, 297 (8th Cir. 1972), *cert. denied,* 412 U.S. 931 (1973).

satisfied with the conclusion reached by an agency in an impact statement to litigate his grievance in a federal court. There will be no dearth of litigants able to specify one more study or "comprehensive analysis" that, in their view, constitute a prerequisite to an adequate impact statement. And inevitably, district courts will continuously expand the volume of evidence required in the preparation of impact statements. In light of the Commission's well-reasoned and informed analysis, there is no basis for sanctioning the expansive standard of judicial review urged by appellees and for substituting the lower court's judgment for that of the Commission.

2. Ironically, while SCRAP-EDF and ISIS strenuously urge this Court to take an unjustifiably expansive view of the scope of the lower court's oversight of the Commission's impact statement, in the next breath they seek to immunize the lower court's decision from this Court's scrutiny by making the novel and unwarranted assertion that the lower court's decision can be overturned only if this Court finds it to be "clearly erroneous." SCRAP-EDF Br. 45-48; ISIS Br. 20-23. Appellees' misconception of the scope of this Court's review of the lower court's decision is consistent with their misconception of the scope of the lower court's review of an agency's impact statement: in each instance the appellees proceed from the mistaken premise that a three-judge court reviewing an ICC order is a species of trial court hearing evidence and making independent findings of fact, when in truth it is essentially an appellate tribunal exercising a conventional limited review of agency action.

It is well settled that suits under the Urgent Deficiencies Act to set aside an order of the Commission are

proceedings for judicial review upon the record before the Commission and are not trials *de novo.*[23] It is equally clear that this Court in reviewing such decisions of three-judge courts has accorded their determinations no special deference.[24] Rather, this Court has focused directly on the action of the Commission, often without even mentioning the reasoning or determinations of the three-judge court.[25]

The proceedings in the District Court corresponded to this well-established practice and understanding. No trial was held, no witnesses were heard, and no detailed findings of fact were made.[26] Rather, the District Court simply reviewed a record made before the agency and transmitted to the District Court, and its judgment depended not on evaluating the credibility of witnesses

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[23] *See, e.g., United States* v. *Louisville & Nashville R.R.*, 235 U.S. 314, 320 (1914); *Louisville & Nashville R.R.* v. *United States*, 245 U.S. 463, 466 (1918); *Lang Transp. Corp.* v. *United States*, 75 F. Supp. 915, 922 (S.D. Cal. 1948); *Edwards Motor Transit Co.* v. *United States*, 201 F. Supp. 918, 920-21 (M.D. Pa. 1962). The fact that under the recent amendments to the judicial code such suits are now required to be brought in the courts of appeals underscores the appellate character of the courts' review. See P.L. 93-584, 88 Stat. 1917 (Jan. 2, 1975) reproduced in part in SCRAP-EDF Br. 2a-3a.

[24] *See, e.g., Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 43 U.S.L.W. 4091 (U.S. December 23, 1974); *United States* v. *Dixie Highway Express, Inc.*, 389 U.S. 409 (1967); *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515 (1946); *ICC* v. *Inland Waterways Corp.*, 319 U.S. 671 (1943).

[25] *E.g., ICC* v. *Mechling*, 330 U.S. 567 (1947); *ICC* v. *J-T Transportation Co.*, 368 U.S. 81 (1961).

[26] The affidavits submitted by the railroads were directed against preliminary injunctive relief and were essentially similar in character to the affidavits that are normally filed in courts of appeals or in this Court in connection with an application for stay, or opposition to stay, pending judicial review.

but on reviewing the same agency record and impact statement that is before this Court.[27] It is manifestly unsound to suggest that this Court must accord the District Court's decision the deference accorded to a trial court's finding: any issue that the District Court was entitled to consider is equally open to review in this Court.

3. Scattered throughout the brief of SCRAP-EDF are references to the Commission's environmental impact statements prepared in connection with *Ex Parte Nos. 270* and *295*. They cite these statements to support a variety of arguments such as their assertions that the Commission reached the wrong conclusion in *Ex Parte No. 281* (SCRAP-EDF Br. 9-13), that it should have conducted its preparation of its impact statement in *Ex Parte No. 281* differently (*id.* 57-64), and that, since the Commission has "cured" the defects of its earlier impact statement in its subsequent impact statements, the case may somehow be moot. *Id.* at 19-20, 64, 78. What EDF-SCRAP's brief fails to mention are the critical findings in both the later impact

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[27] While the briefs of SCRAP-EDF (p. 46) and ISIS (p. 21, n.18) point to *Environmental Defense Fund* v. *Corps of Engineers*, 492 F.2d 1123, 1137 (5th Cir. 1974), as supporting their view, that case involved "an extensive trial on the merits" (492 F.2d at 1132) on plaintiffs' motion to enjoin construction of a navigation project, where the trial court, after hearing substantial testimony from live witnesses, made "detailed individual findings." *Id.* Appellees' reliance on such precedents as *United States* v. *United States Gypsum*, 333 U.S. 364, 394 (1948) and *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 274-75 (1949) (see SCRAP-EDF Br. 46-48; ISIS Br. 21-22), hardly merits a response. These cases, many of them patent or antitrust actions, involved lengthy trials before federal trial courts which made elaborate findings on the basis of evaluation of the credibility of live witnesses and extensive documentary evidence.

statements that, just as the Commission had concluded in *Ex Parte No. 281,* the environmental impact of increases in rates on recyclables will be "negligible" or "insignificant." *Ex Parte No. 270* (Sub. Nos. 5 and 6), Final Environmental Impact Statement p. i (1974); *Ex Parte No. 295* (Sub. No. 1) Final Environmental Impact Statement p. i (1974).

From the SCRAP-EDF presentation of the conclusions the Commission reached in its later impact statements, a casual reader would never know that the Commission in fact emphatically reaffirmed rather than undermined the conclusions it had reached in *Ex Parte No. 281.* SCRAP-EDF's brief refers only to truncated portions of the Commission's conclusions in its *Ex Parte No. 295* impact statement. For example, the brief makes the following statement, with "supporting evidence," in an attempt to suggest that the described impact was substantial:

> "In the environmental impact statement prepared in *Ex Parte 295,* . . . the Commission estimated that a 3 per cent rail freight increase on goods being shipped for recycling—rather than having no significant environmental impact, as claimed in the Commission's previous boilerplate "findings," and in the *present* impact statement—would mean the following with respect to non-ferrous metals alone:
>
> > "[A]n estimated [additional] 3,097 tons of metal will be annually required from virgin ores. An increased yearly power consumption of 21.8 million kilowatt hours can be expected, with an increase in pollutant emissions of about 15 tons per year." SCRAP-EDF Br. 10-11 (citations omitted).

In context, one gets an entirely different impression of what the Commission said in *Ex parte No. 295:*

> "The principal findings of the study are these:
>
> The proposed 3 percent rate increase will do nothing to stimulate recycling. On the contrary, any perceivable effects will involve some diminution of the rate at which secondary commodities are reclaimed. However, the quantitative effects of a 3 percent rate increase will be very small, in all cases only a fraction of 1 percent of the presently recycled volume of any commodity. *As a result the environmental impacts in terms of increased consumption of resources (including energy) and of pollution, are expected to be insignificant.*
>
> Specifically, in regard to non-ferrous metals the decrease in scrap consumption is expected to be about 2/100 of 1 percent of the present volume, as a result of which an estimated additional 3,097 tons of metal will be annually required from virgin ores. An increased yearly power consumption of 21.8 million kilowatt hours can be expected, with an increase in pollutant emissions of about 15 tons per year." *Ex Parte No. 295* (Sub. No. 1), Final Environmental Impact Statement pp. xiii-xiv (1974) (emphasis added).

This example is characteristic of SCRAP-EDF's use of the Commission's environmental impact statement in *Ex Parte No. 295.*[28]

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[28] The excerpts on pages 10-13 of SCRAP-EDF's brief imply, for example, that raising rail rates on recyclables will cause a substantial decrease in scrap reclamation in general and in recycled iron and steel scrap in particular. In fact, the Commission concluded that in both the short and long term any adverse impact of the increase in freight rates at issue would be insignificant (*Ex Parte No. 295* (Sub. No. 1), Final Environmental Impact Statement 4-1, 4-4 (1974)), and that the decrease in recycled iron and steel scrap amounts to less than two-tenths of one percent. *Id.* at xiv.

It is unnecessary to belabor this point, which is simple and straightforward: SCRAP-EDF's selective reading of the Commission's impact statements in *Ex Parte Nos. 270* and *295* does not accurately represent their actual findings and conclusions. These extensive studies in fact reiterate the basic conclusion which the Commission reached in *Ex Parte No. 281:* that a limited increase in railroad freight rates on recyclables—as part of general rate increases applicable to all commodities including those allegedly in competition with the recyclables—would not significantly affect the quality of the human environment.

CONCLUSION

For the reasons stated above and in the railroads' opening brief, the decision of the lower court should be reversed.

Respectfully submitted,

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March 1975

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1971

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF

1. The appellees—Students Challenging Regulatory Agency Procedures, *et al.* (SCRAP), National Association of Recycling Industries, *et al.* (NARI), and Institute of Scrap Iron and Steel, Inc. (ISIS)—contend that there is no jurisdiction over this direct appeal from the final order of a three-judge court setting aside an order of the Interstate Commerce Commission. We have addressed this contention in our memorandum in opposition to the motions to dismiss, and rely upon our analysis there. Because the district court set aside an order of the Commission, jurisdiction is conferred by 28 U.S.C. 1253 in conjunction with the Urgent Deficiencies Act of 1913, as carried forward into 28 U.S.C. 2321-2325.

Appellees' argument that the district court entered no more than a declaratory judgment is inaccurate, in addition to being (in our view) irrelevant. The court's judgment (J.S. App. B, p. 2b) "vacated" the orders of the Commission and "ordered" the Commission to conduct "further proceedings consistent with the opinion in this case." The opinion required the Commission to prepare a new impact statement and reopen Ex Parte 281 (J.S. App. A, pp. 39a-41a). This language is mandatory, and it is therefore not controlling (for jurisdictional purposes) that the district court declined appellees' additional request for an injunction against the collection of the increased rates.[1]

2. In addition to the issue of appellate jurisdiction, there is another issue concerning the original jurisdiction of the district court. The appellant railroads argue that the Commission's general revenue proceedings are immune from judicial review; the appellees take the contrary position, contending that the district court correctly held that it had jurisdiction in this case. Both sides have cited and discussed the views expressed by the United States and the Commission in prior cases in this Court raising similar questions.[2] We adhere to those views; accordingly, we have not contested and do not challenge now the jurisdiction of the district court.

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[1]Appellees contend that the only consequence of the district court's order is a change in the burden of proof in future proceedings challenging the rates established. This would be the consequence of the part of the judgment vacating the Commission's order. But if the Commission conducted the "further proceedings" directed by the judgment, it would enter a fresh decision with respect to the rates, and the change in the burden of proof applies only during the pendency of the proceedings until the new order is entered.

[2]*Atlantic City Electric Co.* v. *United States*, 306 F. Supp. 338 (S.D. N.Y.), and *Alabama Power Co.* v. *United States*, 316 F. Supp. 337 (D. D.C.), both affirmed by an equally divided Court, 400 U.S. 73; *Electronic Industries Ass'n* v. *United States*, 310 F. Supp. 1286 (D. D.C.), affirmed, 401 U.S. 967.

The position taken by the United States and the Commission in the cases cited in note 2, *supra*, is basically this: There is nothing inherently unreviewable about a general revenue order of the Commission authorizing general rate increases after proceedings under 49 U.S.C. 15(7). Therefore, the order is reviewable to the extent that it reflects final administrative decisions. Upon issuance of the order, the Section 15(7) proceedings are complete; consideration of detailed questions about particular rates, however, must await the institution of new proceedings under Section 15(1) by the filing of specific complaints with the Commission under Section 13 (49 U.S.C. 15(1), 13).

Thus, when the challenge to a general revenue order of the Commission focussed solely on particular rates for particular commodities, we have argued[3] that judicial review is unavailable because these are matters the Commission did not finally decide in the Section 15(7) proceedings, and because other remedies (such as a complaint under Section 13) are available. On the other hand, when a general revenue order was challenged on the basis that the Commission erred in determining that the railroads' revenue needs warranted a general increase, we have argued in favor of direct judicial review, because in regard to this matter the Commission had made a final determination.[4]

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[3]See Motion to Affirm and Supplemental Memorandum for the United States and the Interstate Commerce Commission in *Electronic Industries Ass'n* v. *United States*, *supra* (No. 423, October Term, 1970).

[4]See Brief for United States, the Secretary of Agriculture and the Interstate Commerce Commission in *Atlantic City Electric Co.*, *supra*, and *Alabama Power Co.*, *supra* (Nos. 78 and 106, October Term, 1970), at pp. 18-22.

In this case, appellees broadly attacked the Commission's general revenue order on the basis that the accompanying final environmental impact statement was inadequate. Appellees argued, and the court below held, that the Commission should have considered, in addition to the effect of the general rate increases, "whether the underlying rate structure itself significantly affects the environment" (J.S. App. A, p. 34a). In regard to these matters, the Commission made a decision that was final when issued, and no other forum would appear to be appropriate for a review of the Commission's determinations. This case is therefore analogous to one in which the challenge is directed to the Commission's determination of the railroads' revenue needs, particularly since appellees here alleged the need for an environmental analysis of the entire rate structure. Accordingly, there is no bar to immediate judicial review. While we believe that the appellees' attack is unfounded, the lack of merit in their challenge did not, of course, deprive the district court of jurisdiction to consider their allegations. See *Bell* v. *Hood*, 327 U.S. 678.

3. Appellees SCRAP and ISIS contend that the adequacy of an impact statement must be reviewed under 5 U.S.C. 706(2)(D), which provides that a reviewing court may set aside agency action found to be "without observance of procedure required by law," instead of under the standards we have suggested in our brief.[5] This is a false dichotomy; the problem does not require an "either/or" solution. Each of the standards set out in Section 706(2) is applicable to judicial review of every action of the Commission. *Bowman Transportation, Inc.*

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[5] *Lathan* v. *Brinegar*, 506 F.2d 677, 693 (C.A. 9) (*en banc*), held that review under Section 706(2)(D) is appropriate "because NEPA is essentially a procedural statute."

v. *Arkansas-Best Freight System, Inc.*, No. 73-1055, decided December 23, 1974, slip op. 3.

However, review under the standards of Section 706(2)(D) is of little help to appellees because the Commission followed all of the procedures required by NEPA. As we argued in our opening brief, pp. 40-52, the Commission was entitled to allocate to Ex Parte 270 the full investigation of the rate structure, and did not transgress the commands of NEPA by declining to hold an additional oral hearing after it had circulated its draft impact statement.[6] All that remains for review under Section 706(2)(D) is the content of the impact statement. We submit that, if the Commission issues an environmental impact statement on a timely basis, and considers in good faith all of the elements specified in Section 102(2)(C), there has been full compliance (for purposes of Section 706(2)(D)) with the "procedure" established by NEPA. More detailed challenges to the scope of the Commission's environmental analysis, including appellees' claims that additional studies should have been conducted and additional data gathered, simply are not procedural problems, and they more appropriately may be the subject of challenge under the other standards established by Section 706(2).

4. While appellees seek to wage a general (and basically substantive) campaign against the actions of the Commission, they also contend that this Court's review of the conclusions of the district court is limited to setting aside district court conclusions that are "clearly

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[6]Even if the Commission's compliance with these procedural steps was less than adequate, not all procedural errors require a reviewing court to set aside the agency's action. Section 706 provides that "due account shall be taken of the rule of prejudicial error." As we contended in our brief, environmental considerations so pervaded Ex Parte 281 that any particular shortcomings in compliance with NEPA procedures did not prevent full and fair considerations of environmental concerns.

erroneous" (ISIS Br. 20-23; SCRAP Br. 45-48). This is an inversion of the correct standard of review.

The conclusions and procedures of the Commission are presumptively correct; the Commission's decisions may be set aside only if the reviewing court can adequately justify such action. *United States* v. *Louisville & Nashville R.R. Co.*, 235 U.S. 314, 320-321; *Bowman Transportation, supra,* slip op. at 4, 10-12. Cf. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416. The Commission's decision, rather than that of the district court, is entitled to deference.

The "clearly erroneous" limitation of Fed. R. Civ. P. 52(a), on the other hand, applies only to "findings of fact," not to conclusions of law. When reviewing agency action under Section 706(2) of the Administrative Procedure Act, the district court ordinarily takes no evidence and makes no findings of fact. In the instant case the record before the district court consisted of the record before the Commission and the Commission's reports and conclusions. Any facts "found" were found by the Commission; the district court's function was to review the record and procedures and decide whether, under applicable legal principles, the Commission's actions must be set aside. This function is a purely legal one, and the district court's conclusions are entitled on review to no deference other than that warranted by the force of its reasoning.[7]

5. We have no quarrel with most of the substantive legal propositions of appellees. Under Section 102(2)(C) of NEPA an agency is required to make a good faith effort to analyze the relevant environmental considerations, issue an impact statement presenting these considerations as early as possible during the agency's prodeeding, and take those considerations into account during the

[7]Nor was any deference to the district court's conclusions shown in the recent decision in *Bowman Transportation, supra.*

agency's review process. The Commission's special environmental rules so provide (Br. App. 58-62), as do the guidelines of the Council on Environmental Quality, 40 C.F.R. Part 1500. We agree that the Commission should, in accordance with NEPA and principles established in the lower federal courts, comply with the impact statment requirement to the fullest extent possible, consider environmental factors at all stages of the agency proceeding, and use all practicable means to further the policies and objectives of the Act.

The translation of these general requirements into specific procedures also depends in part on the nature of the function performed by the Commission and the type of decision under consideration. We have argued in our opening brief that general revenue proceedings of the Commission are not typical of the environmental decisions to which NEPA usually applies, and that the Commission's performance of its environmental duties in this case, given the short time available under Section 15(7) of the Interstate Commerce Act and the broad and "general" nature of a general revenue proceeding, adequately fulfilled NEPA's requirements. We add to that discussion only by addressing appellees' (particularly appellee SCRAP, in their brief at 10-13, 57-64) argument that the Commission's subsequently-issued impact statements in Ex Parte 270 and 295 demonstrate the inadequacy of the impact statement in Ex Parte 281.

Since the draft impact statement in this case was released in March 1973, the Commission has continued to accumulate expertise in evaluating the environmental effects of railroad rate changes. Some ongoing studies have begun to produce results, and more quantification of the size of the environmental effect is possible. But it is altogether natural that this should occur, and the accumulation of this body of knowledge, and its employment in more recent impact statements, is not an objection to the adequacy of the environmental consideration in Ex Parte 281. The only question open in this case is

whether the environmental consideration in Ex Parte 281 was adequate in light of the time available for its completion and the environmental data that was known to, or reasonably could have been gathered by, the Commission. That the Commission now has developed the capacity to make more comprehensive estimates of the environmental effects of its rate decisions does not affect our argument that its environmental consideration in Ex Parte 281 fulfilled the commands of NEPA.

The Commission is not required to reopen a general revenue proceeding (once it has been concluded) simply because additional environmental data has come to light, any more than it would be required to reopen such a proceeding if additional estimates of the revenue impact of the change, or the fiscal needs of the railroads, became available. The approval of the general rate increase reflects the Commission's considered judgment that, on the evidence known to it, an increase is not illegal. Subsequently-discovered information can be utilized in subsequent general revenue proceedings, and could affect the Commission's action at that time. It might appropriately be introduced as well in a proceeding challenging the reasonableness of a particular rate. Either of these alternatives would be more in keeping with the nature of general revenue proceedings and with the demands of efficient administration.

But however that may be, the quantification provided in the environmental impact statements in Ex Parte 270 (Sub-Nos. 5 and 6) and Ex Parte 295 (Sub-No. 1) does not impeach the basic conclusions the Commission reached in Ex Parte 281. Both of the more recent impact statements concluded that the environmental effects of small rate increases on recyclables, taking place at the same time

as small rate increases on virgin materials,[8] will be "negligible" or "insignificant."[9] Each impact statement concludes that the results of small rate changes are so small that less than a few tenths of one percent of the scrap movements will be affected (see, *e.g.*, impact statement in Ex Parte 295, Sub-No. 1, at xiv). The more recent analyses therefore support rather than contradict the Commission's earlier analysis, and confirm the accuracy of the impact statement in Ex Parte 281.

Finally, to the extent the more recent studies undermine in any particular the Commission's earlier conclusions, the data they reveal can be the basis for new decisions in present or future general revenue proceedings, and rates can be adjusted to take full account of the newly-disclosed facts. Such a procedure is ongoing in Ex Parte 270 and, as we argued in our brief, the Commission was entitled to allocate to that proceeding,

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[8]Although an increase in the freight rates for scrap will raise the delivered price of scrap and therefore make it "less attractive," it is inaccurate for appellees to suggest that this demonstrates a significant environmental impact. If a simultaneous increase in the freight rate for virgin materials takes place, scrap will not be relatively disadvantaged, and there will not be any incentive to shift from use of scrap to use of virgin materials, unless an across-the-board increase greater than the level of inflation in the price of the commodities is added to a freight rate structure biased against scrap. But there is no evidence of such a bias (see Br. at 30-32), let alone of a bias aggravated by an increase greater than the rate of increase in the prices of the commodities. The Commission therefore was entitled to conclude that an across-the-board increase would not have a significant environmental impact, while at the same time concluding that a hold-down on the increases for non-ferrous scrap would, by making such scrap relatively more attractive, be environmentally beneficial (cf. SCRAP Br. 52-55). This analysis, and that at pp. 30-32 of our brief, also refutes appellee NARI's contention (at pp. 5-9) that rate increases have produced relative discrimination against non-ferrous scrap.

[9]At p. i of each document.

rather than to particular general revenue proceedings, the full environmental investigation of the basic rates charged by America's railroads.[10]

Respectfully submitted.

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Solicitor General.

FRITZ R. KAHN,
General Counsel,
Interstate Commerce Commission.

MARCH 1975.

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[10]Appellee NARI contends (Br. 51-52) that the Commission "has not embarked upon any investigation of the rate structure for these basic recyclable solid waste materials * * *." Although the Commission denied NARI's request for a separate investigation of non-ferrous scrap, the rates for such scrap *are* under study in Ex Parte 270 (SPC Group Nos. 119-122, main docket) as part of the investigation into all rates and charges by the railroads. The denial of NARI's request meant only that there would not be a separate sub-numbered investigation of such scrap; separate sub-numbered investigations have been confined to a few of the most important commodity groups such as iron ore and steel, coal, wood, and the like. Counsel for NARI is aware of this distinction, and has been requested to submit materials that would bear on the ongoing investigation of the rates of all commodities, including non-ferrous scrap.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 73-1966 and 73-1971

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.) ET AL, *Appellees*

ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL, *Appellants*

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.) ET AL, *Appellees*

On Appeal from the United States District Court for the District of Columbia

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SUPPLEMENTAL BRIEF FOR APPELLEES NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., ET AL.

PRELIMINARY STATEMENT

This supplemental brief on behalf of appellees NARI et al. is filed prior to hearing under and pursuant to the provisions of Rule 41(5) of the Supreme Court Rules. It presents exclusively late authorities and other intervening matters that were not available for inclusion in appellees' brief-in-chief.

I.

Late Authorities Filed To Demonstrate The Commission's Continuing Complete Refusal To Comply With NEPA Right Up To The Date Of Argument In This Case.

In Point V of appellee NARI's main brief, we cited a long list of authorities to demonstrate the Interstate Commerce Commission's complete disdain, hostility and contempt for the National Environmental Policy Act (NEPA) and its statutory requirements, and we contended that the Commission's repeated refusals to comply therewith made it absolutely imperative for the district court in this case carefully to review not only the *form*, but also the *substance* of the Commission's *alleged* compliance with NEPA in the pending action.

On February 24, 1975, after appellee NARI's main brief was filed with this Court, the United States District Court for the District of Columbia rendered its decision in *Maine Central Railroad Company* v. *Interstate Commerce Commission* (See *App. C* hereto), a case which depicts the Commission's continuing defiance of NEPA right up to the very moment the instant case comes before this Court for oral argument. In *Maine Central Railroad,* the district court ruled on February 24, 1975:

> "The Interstate Commerce Commission has unlawfully failed to promulgate valid regulations or procedures for the preparation of environmental impact statements, as required by 42 U.S.C. § 4332 and recommended in 40 C.F.R. § 1500 *et. seq., despite the clear mandate of judicial decisions. Harlem Valley Transportation Assn.* v. *Stafford,* 500 F.2d 328 (2d Cir., 1974); and *Greene County Planning Board* v. *FPC,* 455 F.2d 412 (2nd Cir.), *cert.* denied, 409 U.S. 849 (1972)."

Moreover, since appellees' briefs were filed in this case, a Petition for Review was filed under recently-enacted Public Law 93-584, 88 Stat. 1917, in the United States Court of Appeals for the District of Columbia Circuit to challenge the Commission's total failure to prepare any Environmental Impact Statements whatsoever under NEPA before it approved a series of further general rate increases for the transportation of recyclable commodities in *Ex Parte 299—Increased Freight Rates and Charges to Offset Retirement Increases,* 1973, and *Ex Parte 303—Increased Freight Rates and Charges,* 1974; and to challenge the Commission's complete disregard for the requirements of recently-enacted Section 603 of The Rail Reorganization Act of 1973 (Public Law 93-236, 93rd Congress) which specifically directed the Commission to *"adopt appropriate rules"* to *"eliminate discrimination against the shipment of recyclable materials in rate structures . . . where such discrimination exists"* (See *National Association of Recycling Industries, Inc.* v. *United States and Interstate Commerce Commission,* CCA, D.C. Docket No. 75-1225, filed 3/14/75.)

II.

Documentary Material Just Obtained By Appellees Regarding The Government's Inexplicable, Arbitrary Denial Of The Requests Of The Environmental Protection Agency And The President's Council On Environmental Quality To Be Heard Before This Court In Support Of The District Court's Rulings In This Case.

Both railroad appellants and the Government agree in their briefs that, if this case is properly before this Court at this time, the basic questions presented arise completely under the National Environmental Policy

Act (NEPA), 42 U.S.C. § 4321 et seq. (See Railroads' Brief, pg. 4; Govt's Brief, pgs. 2, 3).

Because they are charged by that very statute (NEPA)[1] and Executive Orders issued by the President of the United States[2] with the administration of that statute (NEPA) and with the duty of appraising the compliance of other federal agencies with the statutory requirements of NEPA, both the Environmental Protection Agency and (upon information and belief) the President's Council on Environmental Quality thus formally applied to the Solicitor General of the United States for permission to file *amicus curiae* briefs or otherwise to present their views and arguments to this Court in support of the district court's opinion and judgment in this case (See *App. D* hereto).

For example, the Environmental Protection Agency, in support of its desire to be heard in this case, advised the Solicitor General on February 4, 1975 (*App. D* hereto):

> "The Environmental Protection Agency is of the opinion that the environmental impact statement of the Interstate Commerce Commission in Ex Parte No. 281 does not meet the requirements of Section 102(2)(C) of the National Environmental Policy Act . . . .
>
> " . . . Such an impact statement does not, in EPA's opinion, comport with the 'good faith rea-

[1] See National Envinromental Policy Act, 42 U.S.C. § 4321, 4341-4344.

[2] See Reorganization Plan No. 3 of 1970, after 42 U.S.C. § 4321, signed by the President on July 9, 1970; Executive Order 11514, dated March 5, 1970, entitled "*Protection and Enhancement of Environmental Quality.*"

soned analysis' required where comments of 'sister agencies disclose new or conflicting data or opinions that cause concern that the agency may not have fully evaluated the project and its alternatives.' *Silva* v. *Lynn,* 482 F.2d 1282, 1285 (1st Cir., 1973)."

The Solicitor General, unfortunately and unfairly appellees submit, simply refused to permit these two federal agencies, charged by law with the administration and oversight of NEPA, to file briefs with this Court in this case (See *App. D* hereto).

Thus, insofar as the Government's participation in this case is concerned, this Court will hear the Solicitor General flatly embrace the NEPA position repeatedly taken by the Interstate Commerce Commission, while at least two other federal agencies, both directly responsible for the proper operation of the statute before this Court for review, have been effectively enjoined from presenting their views and legal arguments in support of the district court's rulings in this case.

Appellees thus suggest, and with the Court's permission, hereby move that, if the Court ultimately decides it has jurisdiction to review the merits of the district court's rulings in this case under NEPA, a fair opportunity be afforded to both EPA and CEQ to file briefs in response to the questions raised herein by appellants under the National Environmental Policy Act.

III.

On March 14, 1975, In Another Recent, Intervening Case, The Railroads, In Effect, Candidly Conceded That It Is Utterly, Physically Impossible For Shippers Of Recyclable Commodities To Challenge General Rate Increases Approved By The Commission In Subsequent Complaint Proceedings Under The Interstate Commerce Act.

The railroads still argue before this Court in this case that general revenue orders issued by the Commission in proceedings such as *Ex Parte 281* should be deemed *not* reviewable because of the *alleged* availability of Section 13 *complaint* procedures,[3] wherein shippers of recyclable commodities might subsequently challenge *"individual rates"* or *"particular tariffs thus increased"* (See Railroads' Brief, pgs. 21-24).

In its decision in this case, the district court suggested, as have many courts in the federal system before it in recent years, that Section 13 complaint procedures do *not* afford an *"adequate remedy"* for *shippers* already saddled with a Commission-approved, unlawful rate increase.

Recently, in *Ex Parte 305—Nationwide Increase Of Ten Percent In Freight Rates And Charges, 1974,* the Commission turned the tables on the railroads and ruled that the pyramidic 10% increase they sought there for the transportation of recyclable commodities would not be allowed on "a general increase basis," but the railroads could, if they desired, increase the 1974 rates for recyclables on an *"individual rate basis,"* i.e. by filing *"individual tariffs"* to cover each such proposed individual increase.

[3] 49 U.S.C. § 13.

From the railroads' point of view, this simply meant that, instead of raising all rates for recyclables at the same time, the rates would have to be raised *"individually", one at a time.*

The railroads, who theretofore argued (as they still do before this Court in this case) that the Section 13 complaint procedure whereby shippers of recyclable commodities burdened with constant annual general rate increases have an *"adequate remedy" under Section 13 to challenge them, individually rate-by-rate through the filing of complaints,* suddenly became frantic. On March 14, 1975, they appeared before the Commission and filed an *"Application For Special Permission"* (see *App. E* hereto) wherein they urged the Commission to reverse itself and permit the filing of *one* new joint tariff whereby the rates for *all* recyclable commodities could be increased simultaneously. In their "Special Permission" filing, the railroads candidly stated for the first time, contrary to the basic position they still take in the case at bar (*App. E*):

> "Unless [special permission] relief is granted herein, applicants would be totally frustrated in their purpose, not because of the merits of the proposed increase, *but by the mechanics of individual tariff adjustment.* In the Eastern District alone, there are more than 1,000 separate tariffs containing line-haul rates and switching charges applying on the movement of recyclables, and there is a multitude of tariffs in the same territory which would have to be adjusted to reflect the proposed increase on other accessorial charges, such as weighing, transit, etc. The effort required under these circumstances would be such as to completely defeat these applicants in applying any across-the-board increase on recyclables for an indeterminate but obviously lengthy future period."

The relevant point, of course, is that if the railroads would be *"frustrated in their purpose"* by merely being required to file *thousands* upon *thousands* of *individual tariffs* to accomplish *one annual rate increase* for the transportation of recyclable commodities, *how could the Section 13 complaint procedure possibly be deemed an "adequate remedy" for national shippers of recyclable commodities who must challenge those rate increases, on an individual tariff-by-tariff basis, in thousands upon thousands of complaint proceedings before the Commission?*

In each such complaint case under Section 13, the railroad involved has the right to file an answer "within a reasonable time". The Commission then has the duty "to investigate" each matter complained of in such manner as it deems proper. The Commission's decision in each case is then subject to court review.

In other words, if a mere *"individual tariff filing"* requirement *allegedly* "frustrates" the railroads' ability promptly to effectuate annual rate increases on recyclables, the lengthy, *"individual complaint"* procedure provided by Section 13 presents an absolutely impossible, insurmountable barrier to the effective review of general rate increases licensed by the Commission in a proceeding such as *Ex Parte 281* . If each Section 13 case took just 2 to 3 years to litigate, it would, by the railroads' own admission in their recent "Application For Special Permission", take no less than roughly 2,000 to 3,000 case-years to complete the complaint procedures applicable to all Eastern District tariffs alone!

Appellees reiterate, therefore, that the Section 13 complaint procedure is, in no sense, an "adequate

remedy" or indeed any remedy at all in a case such as this wherein the Commission has approved a nation-wide increase for the transportation of all recyclable commodities wherever they may be carried in the United States.

IV.

The Government Continues Falsely To Represent That "Studies Underway In Ex Parte 270" Will Eliminate All Unlawful, Unreasonable Freight Rates Found To Discriminate Against Recyclable Wastepaper, Textile Wastes And Non-Ferrous Metal Scrap. In A Letter Dated March 5, 1975, The Commission's Special Projects Attorney In Ex Parte 270 Admits In Effect That This Representation Is Not True.

In NARI's main brief, it was demonstrated, with supporting written evidence received from the Commission itself, that it was patently false for the Government to argue in this case that a Commission investigation is underway in *Ex Parte 270* which will eliminate all unlawful rates found to discriminate against recyclable wastepaper, textiles and non-ferrous metal scrap (See NARI brief, pgs. 51, 52; *App. A, B*).

In its Reply Brief, the Government nevertheless continues to rely on its original specious contention, and it asserts: ". . . the Commission was entitled to allocate to that proceeding [*Ex Parte 270*], rather than to particular general revenue proceedings, the full environmental investigation of [those] . . . rates. . . ." (See Govt's Reply Brief, pgs. 8-10).

On March 5, 1975, however, after NARI's main brief was on file with this Court, the Commission's Special Projects Attorney in charge of the *Ex Parte 270* rate study procedures, wrote to counsel for NARI emphasizing in effect that the Government's *Ex Parte 270* contentions in this case are *not* true insofar as re-

cyclable non-ferrous metal scrap, wastepaper and textile wastes are concerned. He reemphasized, first of all, that none of these recyclable commodities have been included in any of the seven formal *Ex Parte 270* "lead dockets." He then stated that rates charged for *non-ferrous metal scrap* and 125 other commodities have simply been referred by the Commission to *his "Special Projects Group"* for *"study and analysis"*, but he immediately emphasized and warned:

> "Thus, as you can appreciate, we have no powers other than those possessed by any other independent party to *Ex Parte 270,* such as yourself. *Specifically, we have no powers 'to issue meaningful orders correcting any serious inequities, discrimination or unlawful rates' should such be found to exist. . . .*" (Italics supplied.)

Finally, the Special Projects Attorney's letter of March 5, 1975 was *absolutely silent* concerning recyclable wastepaper and textile wastes. It was restricted entirely to non-ferrous metal scrap, indicating of course that the rate structure for wastepaper and textile wastes, the largest contributors to this country's growing "mountains of solid waste," are *not* even part and parcel of the meaningless "study and analysis" procedures in *Ex Parte 270.*

Respectfully submitted:

EDWARD L. MERRIGAN
Attorney for Appellees
NARI et al.
888 17th Street, N.W.
Washington, D. C. 20006

March 1975

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-157

MAINE CENTRAL RAILROAD COMPANY, *Plaintiff*

v.

THE INTERSTATE COMMERCE COMMISSION,
GEORGE M. STAFFORD, *Defendants*

and

AMOSKEAG COMPANY, *Intervenor-Defendant*

Order

(Filed February 24, 1975)

Having considered plaintiff's Motion for Preliminary Injunction, the pleadings and papers filed in support thereof, the responses of defendant and the intervening defendant, and the oral presentation of all parties at argument held on February 14, 1975, it is in accordance with the Memorandum Opinion attached hereto, this 21st day of February 1975,

ORDERED AND ADJUDGED that defendants, their employees, agents and attorneys are hereby preliminarily enjoined, pending trial herein, from holding hearings on the merits in Consolidated ICC Finance Docket Nos. 27620 and 27621, unless and until the defendants shall have

(1) established procedures for the preparation of an environmental impact statement complying with the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4332(2)(B) and 4332(2)(C), and

(2) prepared and circulated and obtained the comments of appropriate public and private entities on a valid draft environmental impact statement compiled in accordance

with such lawful procedures for the preparation of an environmental impact statement.

/s/ JUNE L. GREEN
June L. Green
U. S. District Judge

(Caption Omitted in Printing)

Memorandum Opinion

(Filed February 24, 1975)

This matter came before the Court on plaintiff's Motion for Preliminary Injunction, the pleadings and papers filed in support thereof, the responses of defendants and intervening defendant, and oral presentation of all parties at argument held on February 14, 1975.

The controversy centers on whether the defendants, Interstate Commerce Commission (hereinafter ICC) and its chairman, George Stafford, have complied with the requirements of the National Environmental Policy Act of 1969 (hereinafter NEPA), 42 U.S.C. 4321 *et seq.*, with regard to agency proceedings thus far completed on Consolidated ICC Finance Docket Nos. 27620 and 27621. Agency hearings were scheduled to commence on Finance Docket No. 27620 on February 18, 1975. Plaintiff sought to enjoin holdings of any hearings on the docket numbers herein until such time as ICC established procedures conforming to the requirements of NEPA and developed and circulated a valid Draft Environmental Impact Statement in accordance with the lawful procedures.

FINDINGS OF FACT

1. ICC Finance Docket No. 27620 is an ICC complaint against Amoskeag Company filed April 2, 1974, by plaintiff Maine Central Railroad Company (hereinafter Maine Central), charging that Amoskeag unlawfully possesses power

to control Maine Central, in violation of Section 5(4) of the Interstate Commerce Act, 49 U.S.C. § 5(4).

2. ICC Finance Docket No. 27621, which was consolidated for all purposes with the above complaint, is an application filed April 23, 1974, by Amoskeag Company to acquire control of Maine Central pursuant to Section 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2).

3. Since the adoption of its environmental rules presently codified at 49 C.F.R. 1100.250 (adopted January 14, 1972), the ICC has failed to develop or formally propose to the Council on Environmental Quality (CEQ), regulations or procedures governing the agency's methods for complying with the procedural provisions for the preparation of environmental impact statements established by NEPA, 42 U.S.C. § 4332, and the Guidelines of the CEQ, 40 C.F.R. § 1500 *et seq.*, (1974).

4. The possible environmental impact of the major federal action proposed in Consolidated ICC Finance Docket Nos. 27620 and 27621 has been the subject of substantial controversy among the public and private parties participating in the administrative proceedings. Concern is expressed over the relationship between the proceedings and the proposals of the private applicant, intervenor-defendant Amoskeag Company, for the implementation of operational changes involving Maine Central, Bangor & Aroostook Railroad Company and the Boston & Maine Railroad Company, and the possible development of a New England Railroad System.

5. The Administrative Law Judge of defendant, ICC, in his Memorandum and Order following a prehearing conference served August 7, 1974, found that the matters raised in Consolidated ICC Finance Docket Nos. 27620 and 27621 constitute a proposal for major federal action which may significantly affect the quality of the human environment, thus requiring the issuance of a draft environmental impact statement.

6. The Administrative Law Judge in the August 7, 1974 Order, directed the private applicant, Amoskeag Company, to submit a proposed draft environmental impact statement first, and the other parties to submit such statement at a later date covering at least the environmental issues represented by their respective interests, all in accordance with 49 C.F.R. 1100.250.

7. The Administrative Law Judge further stated that the parties' proposals should not consider the possible environmental relationship of the proceedings to Amoskeag Company's proposals for operational changes affecting Maine Central, Bangor & Aroostook Railroad Company and the Boston & Maine Railroad Company which might be the subject matter of other proceedings before the ICC at a future date.

8. On November 20, 1974, the Commission issued a draft environmental impact statement covering the proceedings in Consolidated ICC Finance Docket Nos. 27620 and 27621, and said statement, with only minor modifications, adopted substantially, and largely in verbatim terms, the environmental analysis and factual material provided by the submission of the private applicant, Amoskeag Company.

9. On December 16, 1974, Maine Central, later joined by the State of Vermont, filed a petition with the ICC seeking dismissal of the application in Finance Docket No. 27621, or alternatively, a stay of the commencement of hearings pending issuance of a draft environmental impact statement which was compiled in accordance with lawful procedure.

10. In an order served January 10, 1975, the Interstate Commerce Commission-Division 3 found that the procedures followed by the administrative law judge in many respects were inconsistent with the policies of the ICC and judicial decisions interpreting the requirements of NEPA, but denied the petition because the opportunity was avail-

able to file comments to the draft which would be given due consideration at the appropriate time, and further that on the merits, relief was not warranted.

11. Notice was served by the ICC on January 10, 1975, that the hearings would commence February 18, 1975, instead of January 20, 1975, as originally scheduled.

CONCLUSIONS OF LAW

1. This Court has jurisdiction to grant injunctive relief, or relief in the nature of mandamus, under 28 U.S.C. §§ 1331 and 1361; 5 U.S.C. §§ 701-706; and 42 U.S.C. §§ 4321 *et seq.*, the National Environmental Policy Act of 1969, *Greene County Planning Board* v. *FPC*, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972); *Harlem Valley Transportation Assn.* v. *Stafford*, 500 F.2d 328, 334 (2d Cir. 1974); *Jones* v. *District of Columbia Redevelopment Land Agency*, 499 F.2d 502, 511-12 (D.C. Cir. 1974); *National Helium Corp.* v. *Morton*, 455 F.2d 650, 654-55 (10th Cir. 1971). The Court thus has jurisdiction to grant declaratory and injunctive relief under 28 U.S.C. §§ 2201-02.

2. Plaintiff has standing in its own right and as a "private attorney general" to enforce the mandates of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, et seq., *Harlem Valley Transportation Assn.* v. *Stafford, supra; Sierra Club* v. *Morton*, 405 U.S. 727, 737, 740 (1972); *National Helium Corp.* v. *Morton*, 455 F.2d at 654-55; *Scanwell Laboratories* v. *Schaffer*, 424 F.2d 859 (D.C. Cir. 1970).

3. The Interstate Commerce Commission's procedures for preparing draft and final environmental impact statements, 49 C.F.R. §§ 1100.250 *et seq.*, violate the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.*, and do not conform with the Guidelines of the CEQ, 40 C.F.R. §§ 1500 *et seq.*, in that they do not provide for the preparation of draft environmental impact statements

prior to public hearings, they call upon private applicants to provide the analysis and factual basis for the Commission's impact statements, and they do not provide a procedural foundation for the Commission's preparation of its own, independent and comprehensive, draft environmental impact statement to be available for informed public comment prior to required public hearings.

4. The Interstate Commerce Commission has unlawfully failed to promulgate valid regulations or procedures for the preparation of environmental impact statements, as required by 42 U.S.C. § 4332 and recommended in 40 C.F.R. § 1500 *et seq.*, despite the clear mandate of judicial decisions. *Harlem Valley Transportation Assn.* v. *Stafford,* 500 F.2d 328 (2d Cir. 1974); and *Greene County Planning Board* v. *FPC,* 455 F.2d 412 (2d Cir.). *cert. denied,* 409 U.S. 849 (1972).

5. Despite the possibly important and controversial issues relating to the scope and extent of environmental impact raised in Consolidated ICC Finance Docket Nos. 27620 and 27621, the Administrative Law Judge of the Commission directed that the parties submit a "proposed draft environmental impact statement" limited in scope. The Commission then issued a draft impact statement which, in its substantial adoption in often verbatim terms of Amoskeag Company's statement, was seemingly devoid of the Commission's own comprehensive and independent analysis in violation of NEPA, 42 U.S.C. 4332 and contrary to the CEQ Guidelines, 40 C.F.R. 1500 *et seq.* Impact statements developed in this manner would not provide, as NEPA requires, for full and fair agency development and consideration of the matters that are to be included in impact statements nor would it secure informed comments from interested public or private persons that, together with the draft impact statement, "shall accompany the proposal through the existing agency review processes" of which a public hearing is a part.

6. For the Interstate Commerce Commission to proceed with preparation of a final impact statement based on comments to the draft, and to proceed with public hearings required under the Interstate Commerce Act on ICC Finance Docket Nos. 27260 and 27261 on the basis of a draft environmental impact statement prepared under such improper procedures violates NEPA, 42 U.S.C. §§ 4321 *et seq.*, and is contrary to the CEQ Guidelines, 40 C.F.R. §§ 1500 *et seq.*

7. The public interest and the balancing of harms warrant injunctive relief to prevent the ongoing violation of the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 et seq., *United States* v. *City and County of San Francisco*, 310 U.S. 16, 30-32 (1940); *Jones* v. *District of Columbia Redevelopment Land Agency*, 499 F.2d 502, 512 (D.C.Cir. 1974).

/s/ JUNE L. GREEN
June L. Green
U. S. District Judge

Dated: February 21, 1975

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
AIR AND WASTE MANAGEMENT

Mr. Edward Merrigan
Smathers & Merrigan
888 17th Street, N.W.
Washington, D. C. 20006

Dear Mr. Merrigan:

As a result of our conversation and the concern I have for the proper resolution of the freight rate and NEPA issues in U.S. v. S.C.R.A.P., I initiated an effort to have EPA submit an amicus curiae brief. This effort culminated in a draft brief and a request from EPA's Office of General Counsel to the Solicitor General for permission to file a brief. This request was refused primarily because EPA's views on the matter are well known to the Court (see the enclosed correspondence). I regret that EPA will not have the opportunity to give a stronger indication to the Court of its position on these issues.

Please notify me when oral argument is scheduled.

Sincerely,

/s/ ARSEN J. DARNAY
Arsen J. Darnay
Deputy Assistant Administrator for Solid Waste Management Programs (AW-562)

OFFICE OF THE SOLICITOR GENERAL
WASHINGTON, D.C. 20530

February 6, 1975

Robert V. Zener, Esq.
General Counsel
United States Environmental
Protection Agency
Washington, D.C. 20460

Re: United States, et al. v. S.C.R.A.P., Nos. 73-1966 and 73-1971, October Term, 1974

Dear Mr. Zener:

I have your letter of February 4, 1975, requesting that the Environmental Protection Agency be authorized to file a separate *amicus curiae* brief in the above case stating EPA's views.

While I understand your views in this matter, it appears EPA has no independent regulatory authority in regard to the actions of the Interstate Commerce Commission involved in this case. Rather, EPA's role was to comment on the ICC's draft environmental impact statements and that was done here. EPA's comments are part of the record and are reprinted in the Joint Appendix. Moreover, counsel for the appellees has relied upon EPA's views in arguing that the ICC did not adequately respond to the comments of EPA and other agencies of the federal government.

Therefore, for these and other reasons discussed with you by telephone, I must respectfully refuse your request for authorization to file a separate *amicus curiae* brief in this case.

Sincerely,

/s/ ROBERT H. BORK
Robert H. Bork
Solicitor General

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

February 4, 1975

OFFICE OF
ENFORCEMENT AND GENERAL COUNSEL

Honorable Robert H. Bork
Solicitor General
Department of Justice
9th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Mr. Bork:

Re: United States (Interstate Commerce Commission), et al. v. S.C.R.A.P., Nos. 73-1966 and 73-1971

I am requesting permission to submit to the Supreme Court the views of the Environmental Protection Agency regarding certain aspects of the above-captioned case. The interest of this Agency in the case stems from our role under the National Environmental Policy Act and the Guidelines of the Council on Environmental Quality in the environmental impact statement process. Specifically, NEPA requires the federal agency proposing a major federal action significantly affecting the environment to obtain comments from the appropriate federal agencies prior to preparing an environmental impact statement. EPA is frequently involved in this comment process. In our view, this commenting process is meaningless unless the federal agency proposing action is required to make an adequate response to the other agency comments. The Environmental Protection Agency is of the opinion that the environmental impact statement of the Interstate Commerce Commission in Ex Parte No. 281 does not meet the requirements of Section 102 (2)(C) of the National Environmental Policy Act.

In particular, EPA believes that the Commission has failed to provide a reasonable evaluation of and an adequate response to a number of serious criticisms which sev-

eral federal agencies have levied against the Commission environmental impact statement. This failure of analysis deprives the final impact statement of thoroughness and objectivity and strongly suggests that the NEPA procedure followed by the Commission lacked the requisite "good faith", "hard look" at the environmental implications of a general increase in rail transportation rates for recyclable materials. The Commission's evaluation in response to agency comments is inadequate in the following three areas:

(a) The impact of the proposed changes in transportation costs on the demand for recyclables;

(b) The impact of the proposed rate increase on capital investment in the recycling industry;

(c) Reasonable alternatives to a general rate increase on recyclables.

Following is a detailed discussion of these points.

EPA, as early as April 24, 1972 in its letter to the Commission, and the Department of Commerce in responding to the draft environmental impact statement, pointed out that the Commission should conduct an economic evaluation on the responsiveness of the demand for secondary materials to changes in transportation costs. It was suggested that such a study consider the cumulative impact of several rate increases as well as the specific impact of the proposed general increase. (Appendix, pp. 572-579)

The major response of the Commission has been to cite limited historical data showing that the demand for recyclables has continued despite past increases in rail rates. This response is inadequate because it is clear that the demand for recyclables is affected by several factors besides transportation costs. It is erroneous to observe the aggregate effect of all pertinent factors (in this case, continued demand for recyclables commensurate with increasing rail rates), yet to conclude without economic analysis that one factor (transportation rates) has no effect. Such evalua-

tion is fallacious, and might just as well lead to the incorrect conclusion, because the demand for non-recyclables has been increasing in the face of rail rate increases, that transportation costs play no role in determining the demand for these materials.

The Commission also responded to EPA's recommendation by merely identifying factors which would have a greater influence on the demand for recyclables than transportation costs. The Commission has conducted no detailed evaluation or quantification of the extent to which transportation costs may affect demand. The Commission has essentially asserted in conclusory fashion that because factors other than transportation costs are the most important determinants of product demand, it need not perform substantive economic analysis on the effect of a rate increase. For example, the Commission stated that because the demand for ferrous scrap metal is related to the total amount of steel produced, the elasticity of demand studies recommended by EPA are unnecessary. Here, too, the Commission's effort to comply with NEPA is superficial, consisting of the economically unsound proposition that because a variety of factors influence the demand for recyclables, reliable evaluation and quantification of the effect of one factor, rail rates, is unnecessary. An objective inquiry into the impact of the rate increase requires at minimum an economic analysis sufficiently detailed to establish a supply-demand curve for each major secondary commodity.

Finally, the inadequacy of the Commission's response to agency comments in this regard is indicated by its apparent lack of conviction in its own limited economic evaluation. While opining that the rate increase will have no impact on the demand for secondary materials, the Commission is simultaneously "holding down" the rate increase on recyclables other than ferrous metal, in the belief that such action "should encourage the movement and recycling of commodities." (Appendix, p. 574).

Similarly, in Ex Parte 295, as to certain scrap commodities, the Commission has reached conclusions contrary to those of its cursory analysis in Ex Parte 281. Thus, in Ex Parte 295 the Commission has recently concluded as to a 3% rate increase on nonferrous scrap:

> "[An estimated [additional] 3,097 tons of metal will be annually required from virgin ores. An increased yearly power consumption of 21.8 million kilowatt hours can be expected, with an increase in pollutant emissions of about 15 tons per year. (ICC, Final Environmental Impact Statement, Ex Parte 295, Increased Freight Rates and Charges, 1973—Recyclable Materials p. 2-13.).

With respect to iron and steel scrap, the Commission now says that a rail freight increase of 3 per cent on scrap being transported for recycling will result in:

> "an expected annual decrease in recycled scrap of . . . 67,000 tons . . . , resulting in additional mining requirements for 156,000 tons of domestic ore, 58,300 tons of coal and 14,700 tons of limestone and dolomite. The processing of additional ore is expected to require an increase of 324 thousand megawatt hours; increased pollutants emitted are estimated as 4,500 tons (on a controlled basis)." (p. xiv)

Moreover, the Commission now acknowledges that:

> "In the long term, the effect of the proposed 3 per cent rate increase will be to perpetuate and increase any inequities that may exist in the rail freight structure between primary and secondary commodities. Such an effect applies particularly to waste paper and to non-ferrous metals for which the Interstate Commerce Commission has computed differentials in favor of primary materials. [,]" (p. xv-xvi)

and that:

> "to the extent that [the proposed 3 percent rate increase] decreased the movement of scrap and brought

about a corresponding increase in the consumption of virgin metal, there may be adverse effects on the environment . . . , relating not only to accumulation of solid waste but also to the secondary consequences of resource consumption, higher level of pollutants discharged during processing, and—most of all—greatly increased demands for energy. (p. 2-3)

"In this connection, strong arguments can be made, generally and qualitatively, that by increasing the total costs of recycling, raising the rail freight rates will significantly decrease scrap reclamation." (p. 2-19)

A second area of agency comments concerns the necessity for determining whether the proposed rate increase, in its cumulative effect over the long-term, could deter investment in the recycling industry. On the one hand the lack of capital investment in the recycling industry adversely affects the demand for recyclables. Yet because the Commission has failed to determine the importance of transportation rates to the long-term demand for recyclables, it cannot adequately evaluate the impact of a rate increase on capital investment. Such an impact, were it to occur, could in turn reduce the long-term demand for recyclable commodities.

The importance of such a determination is illustrated by one example involving the Commission's finding that electric arc furnaces are expected to produce a growing percentage of the nation's total steel output. These furnaces are not integrated to the ore mining industry and can utilize nearly 100% ferrous scrap. Understanding whether the rate increase would impede the commercial development of such furnaces is necessary in order to evaluate thoroughly the environmental implications of the rate increase.

The Commission also failed to respond adequately to agency comments suggesting an analysis of alternatives

to the proposed rate increase. CEQ and EPA commented that an assessment of the necessity for the proposed rate increase and an evaluation of alternatives entails understanding the extent to which the current rates are cost-based. (Appendix, pp. 705, 708) The feasibility of any rate "hold-down" as an alternative would in part be determined by the degree to which the current rates are cost-based. In particular CEQ and EPA requested a determination of whether secondary materials make a proportionally greater contribution to railroad costs than do competing virgin materials.

The General Services Administration also criticized the draft impact statement for failing to analyze the feasibilty of a rate "hold-down" as an incentive to more recycling. (Appendix, p. 597). The Department of Commerce similarly pointed out that the Commission had yet to evaluate the impact of a rate increase on a rate structure which provides little or no incentive for transporting environmentally charged materials. (Appendix, p. 578).

The Commission's response to all proposals that the alternative of a rate "hold-down" be explored consisted primarily of a dissertation on ICC rate-setting criteria. (Appendix, pp. 213-236). Such a discussion contributed nothing toward answering the questions posed. The Commission has yet to indicate what portion of the transportation rates and the rate increase is attributable to railroad cost, what portion is allocable to non-cost characteristics and whether recyclables are contributing a proportionally greater share to railroad costs.

Without knowing what shipping costs are it is most difficult to weigh the environmental effects of shipping greater or lesser amounts of scrap against the cost of providing the services. Evaluating the feasibility of a major alternative, a "rate holdodown", is therefore impossible. As the Department of Commerce stated in reviewing the

Commission's draft environmental statement, "There is need for solid independent analysis that considers new economic realties." (Appendix, p. 573).

Such superficial response to agency recommendations is illustrated by the Commission's reply to CEQ's suggestion that a "hold-down" on rates for recyclables be imposed pending adequate evaluation of the environmental impact of the rate increase. The Commission stated that such would be "wholly at odds with the achieving of a cost-related pricing structure." (Final EIS, at p. 190). Yet when presented with EPA's proposal to determine whether the rate increase for each commodity was cost justified, the Commission responded that such an evaluation was "so far out of line with the fabric of rate regulation in America that the proposal could not have been considered a practical alternative." (Final EIS, p. 194).

Furthermore, EPA suggested that several other alternatives to a general rate increase be investigated, including the establishment of incentive loading rates (similar to non-ferrous schedules already implemented), improved loading methods, more efficient car desgns, and more efficient scheduling. (Appendix, p. 711). Yet, the Commission, while conceding that the railroad industry has tended to cling to all too many inefficient and uneconomical practices, asserted as its singular evaluation of the proposed alternatives that it does not "believe" such requirements can bring about more efficient carrier management. (Final EIS, p. 199).

In conclusion, it is EPA's view that the Commission's response to these and other important agency recommendations reflects a shallow evaluation of the environmental impacts of and the alternatives to the proposed rate increase on recyclables. As the Department of Interior noted of the Commission impact statement, ". . . instead of an impact appraisal, the main thrust of the discussion

is the justification of increased rail freight rates." (Appendix, p. 703). Such an impact statement does not, in EPA's opinion, comport with the "good faith reasoned analysis" required where comments of "sister agencies disclose new or conflicting data or opinions that cause concern that the agency may not have fully evaluated the project and its alternatives." *Silva* v. *Lynn*, 482 F.2d 1282, 1285 (1st Cir., 1973).

Sincerely,

/s/ ROBERT V. ZENER
Robert V. Zener
General Counsel

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DAVID M. ROGERS
Director of Publication Services

March 14, 1975

File: 5549

APPLICATION FOR SPECIAL PERMISSION

H-225, J. F. Doyle, Agent

To the Interstate Commerce Commission
Washington, DC 20423

J. F. Doyle, Agent for and on behalf of United States railroads (except the Long Island Rail Road Company) respectfully petitions the Interstate Commission under Section 6 of the Interstate Commerce Act, as amended, for authority to depart from the provisions of Tariff Circular 20, so as to publish on statutory notice a Tariff of Increased Rates and Charges containing a conversion table which, if subsequently permitted to take effect, will provide a 10 percent increase on "recyclable" commodities. Connecting supplements will then be issued so as to connect the conversion table to all tariffs containing rates and charges on recyclables.

I

The purpose of this application is to simplify, for both carriers and shippers, the application of a proposed 10 percent increase on recyclable commodities, authority for which was withheld under the order entered by the Commission on June 3, 1974 in Ex Parte No. 305, *Nationwide Increase of Ten Percent In Freight Rates and Charges, 1974.*

Employment of a conversion table to accomplish a widespread adjustment in rates and charges carried in numerous tariff publications is an efficient and clear-cut method of apprising the shipping public of the involved adjust-

ment. The contemplated adjustment in rates and charges on recyclable materials covers a substantial group of diverse commodities, with the basic rates carried in literally hundreds of separate rate tariffs published by agencies and individual lines throughout the United States and Canada. In addition, the contemplated adjustment applies to charges for such services as switching, weighing and transit among others. No reasonably precise estimate of the number of accessorial tariffs applicable within the scope of this adjustment is readily available.

A cursory examination of the situation within Official Territory has been made. If Eastern carriers and their agents must separately amend each individual rate tariff applicable on recyclable materials, in excess of 1,040 tariffs would be involved.

A serious complication, burdensome to shipper and carrier alike, will inevitably arise if it is not possible to accomplish this adjustment by means of a conversion table publication providing for sequential application following Master Tariff X-303. The proposed 10 percent adjustment is to apply to rates and charges increased under the provisions of presently applicable Master Tariffs such as X-299 and X-303. There has ben no final order in Ex Parte 299. Thus, tariff publishers are unable to incorporate the Ex Parte 299 increases in their tariffs (despite the fact that Ex Parte 303 is final).

As a result, unless the Commission is able and willing to grant substantial relief from tariff publishing rules and regulations, the carriers are effectively prevented from implementing the long-overdue adjustment in rates and charges on recyclable materials. Any rule relief accorded would of necessity be complicated and confusing to tariff users. On the other hand, use of a conversion table publication applicable to all existing rates and charges on recyclables will provide an efficient and clear-cut method to accomplish an adjustment of broad and substantial magnitude.

II

A brief description of events preceding the filing of this application should be helpful in understanding the carriers' purpose.

By petition dated April 22, 1974, the nation's railroads, except the Long Island Rail Road, sought authorization from this Commission to increase all freight rates and charges by 10 percent. On June 3, 1974, the Commission issued an appropriate order in Ex Parte No. 305 authorizing implementation of the 10 percent increase on all freight rates and charges except insofar as the increases would apply to the transportation of "recyclables." The order of June 3 withheld any increase in recyclable rates on very specific grounds, to wit:

> "except that in view of the pendency of Ex Parte No. 295 (Sub-No. 1), Increased Freight Rates and Charges, 1973—Recyclable Materials, the said increase is not authorized on the commodities described in paragraph (iii) of the general exceptions to tariff No. X-295-A;" (p. 3)

Pursuant to the authority granted on June 3, the carriers applied the 10 percent increase to all other rates and charges, but no increase was published to apply on recyclables.

On October 29, 1974 the Commission decided the pending Ex Parte 295 (Sub-No. 1) proceeding and authorized therein a 3 percent increase in the rates and charges applying on movements of recyclable commodities. In essence, the condition upon which the Commission has denied relief as to recyclables in its order of June 3, 1974, has been removed.

In these circumstances, the railroads party to the initial petition in Ex Parte 305, excepting the Chessie System and its subsidiaries, filed a petition for authority to amend the Ex Parte 305 master tariff in order to effect as to recyclables the same 10 percent increase which had been approved

six months earlier on all other traffic. This latter petition was filed on December 26, 1974, along with a *Petition for Leave to File* such petition. The procedural *Petition for Leave to File* the substantive petition for authority to amend the Ex Parte 305 tariff was deemed necessary by the petitioners in that more than 30 days had elapsed since the initial Ex Parte 305 order entered on June 3.

On January 13, 1975, the Commission, Division 2, rejected the petition in question as "not timely" in the Ex-Parte 305 proceeding. The rejection was publicized by a *NOTICE* issued in Ex Parte 305 on January 13, 1975. A copy of that Notice is attached hereto as Appendix A.

The reason for rejection, as stated in the Notice, was in obvious error. A procedural petition for leave to file a substantive petition, under the Commission's rules, cannot possibly be held as "not timely". Under Rule 101 of the Commission's Rules of Practice, petitions for reconsideration must generally be filed within 30 days after an order is issued, but Rule 101(e) specifically provides that where good cause is shown, a petition for reconsideration may be filed after the 30-day period. This is in accord with the right granted under Section 17(6) of the Act specifying that any party "may at any time . . . make application for rehearing, reargument or reconsideration . . ." That specific statutory right can be and is limited by Commission regulation to the 30-day period referred to earlier, but, by virtue of both the statute and Rule 101(e), any party is entitled to seek *leave to file* a new petition at any time, and this is generally done through the use of a procedural petition for leave to file the substantive petition. (See, for example, Respondents' Petition for Leave to File Petition for Vacation of Suspension and Petition for Relief, filed September 26, 1968, in Ex Parte No. 259.)

The Commission, of course, may find that the petition seeking such leave does not state "good cause" and there-

upon refuse to consider the accompanying request (petition) for substantive relief, but that is not the case here, and the Commission was completely without authority to reject the petition for procedural relief as "not timely".

III

For reasons not pertinent here and despite the obvious error of Division 2 in rejecting the petition for leave to file a substantive petition as "not timely," petitioners here elected not to seek reconsideration of the rejection. Instead, they chose to follow normal procedures, as suggested in the Notice. The proposal for a 10 percent increase in all rates and charges on recyclables was public docketed by each of the rate bureaus involved, and a public hearing was afforded to all interested shippers on February 11, 1975. Since the proposal would have nationwide application on all recyclable rates, the publication sought was to be effected through a supplement to the Ex Parte No. 305 master tariff.

By letter, dated February 7, 1975, over the signature of the Chief, Section of Tariffs (File 215-56111), Interstate Commerce Commission, the supplement in question was rejected on the ground that the earlier NOTICE issued by Division 2 had denied any authority to proceed in that fashion. There is nothing whatsoever to indicate that the Notice in fact denied such authority. As shown above, the Notice simply—and improperly—rejected the procedural petition as not timely filed.

In any event, the net result is that while the condition upon which the Commission withheld authority to implement the initial X-305 10 percent increase on recyclables was eliminated with the Commission's decision in Ex Parte No. 295 (Sub-No. 1), the carriers since August 29, 1974, have been prevented from the *mere publication* of the 10 percent increase on recyclables through the rather bizarre series of events set forth above.

IV

Under these circumstances, the nation's railroads, except for LIRR, now apply to this Commission for authority to depart from the provisions of Tariff Circular 20 to the extent that the applicants be permitted to *publish* —on not less than statutory notice and subject to protests and petitions for suspension—a 10 percent increase on recyclable commodities by means of a conversion table which will therafter be connected to the existing tariffs containing rates and charges on recyclables.

Unless relief is granted herein, applicants would be totally frustrated in their purpose, not because of the merits of the proposed increase, but by the mechanics of individual tariff adjustment. In the Eastern District alone, there are more than 1,000 separate tariffs containing line-haul rates and switching charges applying on the movement of recyclables, and there is a multitude of tariffs in the same territory which would have to be adjusted to reflect the proposed increase on other accessorial charges, such as weighing, transit, etc. The effort required under these circumstances would be such as to completely defeat these applicants in applying any cross-the-board increase on recyclables for an indeterminate but obviously lengthy future period.

As stated earlier, the relief requested cannot possibly have any adverse effect upon the shipping public. The relief sought is simply in the area of publication. The matter has been public docketed and subjected to a public hearing. The appropriate publication would be filed on statutory notice and subject, of course, to protests and petitions for suspension.

The relief sought herein will have no significant effect upon the environment.

It is our request that this application be granted and notification advice by telephone be given to Mr. Owen Schottinger (AC 212-594-0600).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 73-1966 and 73-1971

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; AND ABERDEEN AND ROCKFISH RAILROAD CO., *et al.*,

Appellants

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES ("SCRAP"); ENVIRONMENTAL DEFENSE FUND; NATIONAL PARKS AND CONSERVATION ASSOCIATION; AND IZAAK WALTON LEAGUE OF AMERICA ("EDF, *et al.*"); INSTITUTE OF SCRAP IRON AND STEEL ("ISIS"); AND NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES ("NARI"),

Appellees

On Appeal from the United States District Court for the District of Columbia

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SUGGESTION OF MOOTNESS BY APPELLEES SCRAP AND EDF, *ET AL.*

I.

At oral argument of this case, on March 26, 1975, counsel for the United States and the Interstate Commerce

Commission made a statement which, if correct, means that this case is moot.

The statement in question pertains to the practical meaning of the lower court's judgment. That judgment "vacated" orders entered by the ICC in *Ex Parte 281*, a general revenue proceeding, and remanded the case "to the Commission for further proceedings consistent with the opinion in this case" (Gov.J.S., p. 2b), *i.e.*, for "reconsideration of the rate increases" approved in *Ex Parte 281*. 371 F.Supp. at 1308, n. 50.

At oral argument, counsel for the Government asserted (Tr., p. 30) that if the Commission is "ordered back to reopen this proceeding" (*i.e.*, if the lower court's judgment is affirmed), then "what the Commission will have to do" is to reconsider the following questions: (a) "*did* the railroads need increased revenue *way back when*," at the time of the Commission's orders in *Ex Parte 281*, and (b) "*did* that action [the orders in *Ex Parte 281*] have an effect on the environment?" Counsel for the Government specifically distinguished question (b) from the question, "*will* this action have an effect on the environment?" (Emphases added.)

If the Commission is correct that the lower court's judgment requires a re-examination of the rate increases approved in *Ex Parte 281* in light of the facts as they stood "way back when," rather than the facts as they stand now, then this case is clearly moot. Since *Ex Parte 281* the Commission has issued a series of subsequent general revenue orders which have radically changed not only the maximum permitted rates on particular commodities, but also the relationship between rates for scrap and primary materials.[1]

---

[1] No one claims, of course, that the lower court's judgment has had the slightest effect on these subsequent general revenue orders, or on the Railroads' collection of any rates authorized thereby.

The most significant of these subsequent general revenue orders is the one in *Ex Parte 310*, which the Commission served on March 25, 1975, just one day before oral argument of this case in the Supreme Court. In *Ex Parte 310* the Commission permitted *no* rate increases on non-ferrous scrap, and imposed the full "hold down" on ferrous scrap which was requested by the appellee Institute of Scrap Iron and Steel. At the same time, the Commission allowed a 7 percent increase on rates for primary commodities.[2] The Commission's rationale for thus favoring recyclables was that "the best information before us indicates that the recycling industry is suffering greatly from the nation's economic downturn," [3] that "we know of no industry which has experienced greater decreases in prices of its products," [4] and that "it remains a basic economic fact that not granting a proposed rate increase for recyclables will generate a degree of positive environmental benefit." [5]

If the rates in effect immediately *prior* to *Ex Parte 281* are taken to be 100, then the rates in effect immediately *subsequent* to *Ex Parte 310* are approximately as follows:

Primary commodities:	140
Ferrous scrap:	120
Non-ferrous scrap:	117

In other words, since *Ex Parte 281*, freight rates on primary commodities have increased approximately 40

[2] This 7 percent increase is equivalent to approximately 10 percent of the rates in effect immediately prior to the Commission's orders in *Ex Parte 281*.

[3] Ex Parte No. 310, Increased Freight Rates and Charges, 1975, Nationwide, p. 37. (Copies of this order have been lodged with the Court.)

[4] *Id.*, p. 38.

[5] *Id.*, p. 39.

percent, while freight rates on recyclables have increased only half as much.

In view of these wholly changed circumstances, it is plain that a purely historical study of whether "the railroads need[ed] increased revenue *way back when*," or of whether the Commission's orders in *Ex Parte 281* "*did* . . . have an effect on the environment" [6] would be a pointless academic exercise. At this late date, such an historical study could not serve as the basis for the Commission's granting any present relief to the appellees in this case or to anyone else.

In short, either the Commission has wholly misconstrued the judgment from which it appeals, or this aspect of the case is moot.

II.

The remaining aspect of the lower court's judgment—its "vacating" of the Commission's orders in *Ex Parte 281*—is plainly without even potential practical effect. The lower court, to be sure, stated that:

> "The only consequence of our vacating the Commission's orders [in *Ex Parte 281*] pending reconsideration of the rate increases 'is that the railroads may not rely, in some subsequent proceeding, on a Commission finding that the proposed rates were just and reasonable. In an action for reparations, for example, the railroads could not gain any benefit from the purported Commission approval of the increases.' Atchison, Topeka & Santa Fe R. Co. v. Wichita Board of Trade . . . 412 U.S. [800] at 818. . . ." 371 F.Supp. at 1308, n. 50.

But we are now persuaded that the lower court's "vacating" of the Commission's orders lacked even the limited, contingent effect which the lower court ascribed to it. As we pointed out at oral argument (Tr., pp. 39-

[6] Tr., p. 30 (emphases added).

41) the key to the puzzle is that the Commission never made a finding in *Ex Parte 281* that any particular rate or group of rates was just and reasonable. Rather, the Commission specifically stated that it did *not* make such a finding. (Gov.J.S., pp. 38d-39d.) Thus the actual effect of the lower court's "vacating" the Commission's orders is that in hypothetical "subsequent proceedings" which may never in fact occur, the Railroads would be unable to make an argument *which they could not make in any event, for reasons wholly apart from the lower court's judgment.*[7]

III.

If the Commission is indeed correct in its reading of the lower court's judgment, and if neither of the two aspects of this judgment, as just described, can lead to any practical consequence or to any present relief, then we fail to see what saves this case from mootness. Should this case be found moot, either by this Court, or by the lower court upon a remand for a determination as to mootness,[8] then we, of course, would agree with the appellant Railroads as to the proper disposition of the case. (See R.R.Reply Br., pp. 4-5.) If a finding of mootness is made by this Court, rather than the lower

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[7] In two highly ambiguous footnotes (Gov. Br., p. 5, n. 4; Gov. Reply Br., p. 2, n. 1) the Commission has asserted that a general revenue order has the effect of "shift[ing] the burden of proof" in possible "future proceedings." It appears that this is so only in the sense that such an order terminates the general revenue proceeding (in which the *carriers* always have the burden of proving a need for increased revenues), and leaves further disputes about particular increased rates to reparation proceedings under § 13(1) of the Interstate Commerce Act, 49 U.S.C. § 13(1) (in which the *shippers* always have the burden of proving the illegality of challenged rates). "Vacating" a general revenue order does not mean, as one might infer from these footnotes, that the burden of proof is shifted to the carriers in subsequent § 13(1) proceedings, if any.

[8] *See, e.g., Indiana Employment Security Division* v. *Burney*, 409 U.S. 540 (1973); *Johnson* v. *New York State Education Dep't*, 409 U.S. 75 (1972).

court, this Court should "reverse or vacate the judgment below and remand with a direction to dismiss." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950).

Respectfully submitted,

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April 1975

APR 15 19
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 73-1966 and 73-1971

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants*

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.) ET AL, *Appellees*

ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL, *Appellants*

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.) ET AL, *Appellees*

On Appeal from the United States District Court for the District of Columbia

OPPOSITION OF APPELLEES NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC. (NARI), COMMERCIAL METALS CO., I. V. SUTPHIN CO. AND FRANKEL BROS. & CO., INC. TO "SUGGESTION OF MOOTNESS" FILED BY COUNSEL FOR EDF ET AL.

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April 1975

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OPPOSITION OF APPELLEES NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC. (NARI), COMMERCIAL METALS CO., I. V. SUTPHIN CO. AND FRANKEL BROS. & CO., INC. TO "SUGGESTION OF MOOTNESS" FILED BY COUNSEL FOR EDF ET AL.

Appellees NARI, Commercial Metals Co. of Dallas, Texas, I. V. Sutphin Co. of Cincinnati, Ohio and Frankel Bros. & Co., Inc. of Rochester, New York hereby oppose the "Suggestion of Mootness" filed herein on April 8, 1975, approximately two weeks after oral

argument and submission of these appeals, by counsel for the Environmental Defense Fund (EDF), and in support of this opposition, these appellees respectfully state.

I.

THIS CASE, WHICH RAISES IMPORTANT THRESHOLD JURISDICTIONAL ISSUES AND ISSUES OF GREAT CONTINUING INTEREST UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT AND OTHER RELATED FEDERAL STATUTES, IS IN NO SENSE MOOT.

In *Southern Pacific Terminal Company* v. *Interstate Commerce Commission,* 219 U.S. 498 (1911), this Court ruled that even in a case where a challenged order of the Interstate Commerce Commission has actually *expired*, a pending litigation challenging the legality of that order, as rendered by the Commission, is not moot. At page 515, this Court stated:

> "In the case at bar the order of the Commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings. But there is a broader consideration. The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated by short term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress."

See also: *United States* v. *Trans-Missouri Freight Association,* 166 U.S. 290, 308; *Federal Trade Commission* v. *Goodyear Tire & Rubber Co.,* 304 U.S. 257, 58 S.Ct. 863 (1938); *Eagles* v. *United States,* 329 U.S. 304, 67 S.Ct. 313 (1946).

In the instant case, the challenged orders of the Interstate Commerce Commission are plainly *continuing orders;* they have in *no* manner *expired.* And, under the judgment of the district court, they will be the subject of further proceedings upon remand to the Commission, if this Court affirms or dismisses the pending appeals for lack of direct appellate jurisdiction; or if this Court fashions a final judgment of its own which remands the case to the Commission for further proceedings.

Insofar as shippers of recyclable commodities represented by NARI herein are concerned, the *continuing,* oppressive nature of the challenged orders is clear. Since the summer of 1973, they have been bearing the entire force of the *Ex Parte No. 281* rate increase for the transportation of recyclable commodities licensed by the Commission's orders, challenged herein as patently illegal under the National Environmental Policy Act (NEPA) and related federal statutes.[1] Those increased rates have forced these shippers to pay an additional $9 million per year in transportation charges, and those huge additional charges will continue to be collected each year in the future unless this Court rules that the Commission's orders were violative of NEPA and that same cannot form a lawful basis for continuing collection.

How, therefore, can anyone seriously contend that a case of this nature is moot? The pending "Suggestion of Mootness" does not even attempt to consider the last mentioned facts. Instead, it simply asserts, in the

[1] The Solid Waste Disposal Act, 42 U.S.C. § 3251 et seq., as amended by The Resource Recovery Act, 42 U.S.C. § 3253a. The Rail Reorganization Act of 1973, Public Law 93-236, Section 603.

vaguest possible manner, that something the Assistant Solicitor General said, or may have intended to say, during oral argument before this Court on March 26, 1975 somehow raises a *new question* regarding the type of evidence to be considered by the Commission in the event this case is ultimately remanded to the Commission for reconsideration. We respectfully suggest that, at best, what the Assistant Solicitor General said, or may have meant to say in that regard, during argument, in no sense renders this entire litigation moot. On the contrary, as now discussed by counsel for EDF in his pending "Suggestion", the Assistant Solicitor General's remarks merely seem to add possibly another new question to be considered and resolved by this Court—i.e., in the event this case is remanded to the Commission for further proceedings as directed by the District Court, what type of evidence should the Commission consider and with reference to what time frame.

But patently, one thing is crystal clear. Nothing the Assistant Solicitor General said and nothing he may have meant to imply, expunged the challenged orders of the Commission in this case or cancelled the challenged rate increase licensed by the Commission, pursuant to which the recycling industry represented by appellee NARI herein is being compelled, and will continue to be compelled to pay $9 million a year in additional, unlawful freight rates.

Moreover, the Court will surely recall that the two direct appeals in this case raise serious questions regarding *this Court's jurisdiction* to hear and determine at this time the other important questions raised *"on the merits"* under the National Environmental Policy Act (NEPA) and the other related federal statutes mentioned above. (*Public Service Commission of Mis-*

souri v. *Brashear Freight Lines, Inc.*, 306 U.S. 204, 59 S.Ct. 480, 83 L.Ed. 608 (1939); *Gunn* v. *University Committee To End The War*, 399 U.S. 383, 391, 90 S.Ct. 2013 (1970); *Rockefeller* v. *Catholic Medical Center*, 397 U.S. 820, 90 S.Ct. 1517, 25 L.Ed. 2d 806 (1970)). There is absolutely nothing in the pending "Suggestion" which even contends that this basic threshold *jurisdictional* issue has been rendered moot in any respect.

Indeed, if this Court rules it lacks jurisdiction to entertain these two direct appeals, especially in light of the provisions of Public Law 93-584 which recently became effective, then seemingly this Court should not even address the pending "Suggestion of Mootness" which plainly is directed, at best, to the *"merits"* of the two pending appeals. In this connection, when EDF's view of this case was apparently in better focus, EDF stated in its brief, at page 29:

> "But appellants . . . are not properly before this Court under 28 U.S.C. § 1253."

Thus, as a matter of law, this Court must still determine whether the two direct appeals in this case should be completely dismissed for lack of jurisdiction under 28 U.S.C. § 1253 (*Public Service Commission* v. *Brashear*, supra; *Hutcherson* v. *Lehtin*, 399 U.S. 522, 90 S.Ct. 2238 (1969); *Mitchell* v. *Donovan*, 398 U.S. 427, 90 S.Ct. 1763, 26 L.Ed.2d 378 (1970)); or whether, as a matter of judicial discretion, they should be routed, via the district court, back to the United States Court of Appeals for the District of Columbia Circuit, where plainly they should have been filed originally, and where today all such appeals *must* be filed under Public Law 93-584.

Furthermore, the Court will also certainly recall that the railroads have repeatedly argued in this case that the district court, in turn, lacked *jurisdiction* to review the Commission's general revenue orders in *Ex Parte No. 281* (Railroad's brief, pg. 21 et seq.); that appellees have simultaneously, unanimously taken an absolutely contrary position and they contend that the district court did possess jurisdiction to review the Commission's record of compliance or non-compliance with the National Environmental Policy Act (EDF brief, pg. 31 et seq.; NARI brief, pg. 24 et seq.; ISIS brief, pg. 10 et seq.); while the Government has advised the Court, both in its briefs and during oral argument, that, in its judgment, the district court was correct to entertain this case for review under NEPA (Government's reply brief, pgs. 3, 4). Again, there is nothing in the pending "Suggestion" which renders this issue moot. In fact, it would be rather astounding if counsel for EDF should suddenly espouse any such position in light of the following statement in his earlier brief herein (at page 33):

> "This foreclosure of review [asserted by the railroads] would preclude environmental groups such as SCRAP and EDF *et al.* from litigating the issue which has practical consequences for them, their members and the environment, namely, the asserted *cumulative* environmental impact of a percentage rate increase which includes rates on recyclables."

Finally, of course, this case involves other extremely important questions *"on the merits"* under the National Environmental Policy Act (42 U.S.C. § 4321 et seq.) and the other related federal statutes mentioned above, which by no stretch of the imagination

are presently moot. Essentially, these questions are as follows:

(i) Whether the Interstate Commerce Commission, which has an established record of adamantly refusing to comply with the plain requirements of Section 102(2)(C) of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C), may lawfully ignore those statutory directives by arbitrarily failing and refusing to prepare any acceptable or sustainable Environmental Impact Statement *prior* to the rendition of its *final* decision and order in a nationwide freight rate increase proceeding, wherein it expressly approved another across-the-board, unreasonable, discriminatory, pyramidic increase in transportation rates for recyclable wastepaper, textiles and scrap metal (*NARI Brief,* pg. 3).

(ii) Whether the Interstate Commerce Commission may lawfully defeat and circumvent the plain requirements of Section 102(2)(C) of NEPA by waiting until several months *after* it has already rendered a final decision and order in a nationwide freight rate increase proceeding, wherein it expressly approved another across-the-board increase in transportation rates for recyclable commodities, to prepare *for the first time,* a *post-mortem* Environmental Impact Statement, the sole purpose of which was to rationalize, *nunc pro tunc,* the rate increase theretofore approved seven months before (NARI Brief, pg. 3).

(iii) Whether the Interstate Commerce Commission, which is obliged by Section 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7), to hold meaningful hearings to determine the *"lawfulness"* of proposed rate increases, may properly issue a final order approving such rate increases and only *thereafter* consider the *"lawfulness"* of such approved increases under the National Environmental Policy Act in *post-decision* proceed-

ings that flatly deny the right to any hearing on the *new issues* thus belatedly raised (NARI Brief, pg. 3).

(iv) Whether in a case of this nature where the Commission has constantly exhibited hostility to the requirements of the National Environmental Policy Act, the district court properly exercised its judicial power to review not only the *form* of the Commission's alleged, belated compliance with NEPA, but the *substance* of that alleged compliance as well; and where the court found the Commission's alleged compliance to be seriously inadequate or capricious, was it proper for the court to remand the case to the Commission for further administrative proceedings consistent with the court's decree (*NARI Brief,* pg. 4).

The resolution of these vitally important questions under NEPA is still critically necessary, not only insofar as the instant case is concerned, but also because, until they are resolved, they will continue to arise in case after case in the future involving proceedings before the Interstate Commerce Commission and other federal agencies, and for that reason also, they plainly are not moot. (See *Southern Pacific Terminal Company* v. *Interstate Commerce Commission, supra*).

II.

IT IS ABSOLUTELY ERRONEOUS AND IMPROPER FOR EDF TO SUGGEST, WITHOUT ANY SUPPORT IN THE RECORD BEFORE THE COURT, THAT THE VERY LIMITED RECENT ACTIONS TAKEN BY THE COMMISSION IN EX PARTE 310 HAVE "RADICALLY CHANGED ... THE RELATIONSHIP BETWEEN RATES FOR SCRAP AND PRIMARY MATERIALS."

The wholly specious, baseless statements made at pages 2-4 of EDF's "Suggestion of Mootness" regarding the overall effect of the Commission's recent, *ex-*

tremely limited actions in *Ex Parte 310* are grossly improper and they should be stricken for lack of any support whatsoever in the factual record before this Court, and because they are plainly false and inaccurate.

As demonstrated in NARI's main brief herein,[2] on the basis of the record actually before this Court—

> (i) in 1959, virgin pulpwood was carried by the nation's railroads at average national freight rates 13.9¢ per cwt. lower than those charged for the transportation of competing wastepaper.
>
> (ii) By 1971, as a result of % rate increases granted by the Commission in a series of *Ex Parte* proceedings, that rate advantage had grown to 18.6¢ per cwt. in favor of pulp.
>
> (iii) Similarly, by 1971, virgin non-ferrous ores enjoyed a 17.7¢ per cwt. advantage over competing non-ferrous metal scrap, and that advantage had grown from a 13.3¢ per cwt. advantage in 1959, as a result of successive *Ex Parte* % increases allowed by the Commission.

Since 1971, further distortions of these rate relationships were fashioned by the Commission in *Ex Parte 281* (2.5% surcharge, plus 3%), *Ex Parte 295, Sub 1* (3%), and *Ex Parte 299* (2.8%). In many of these *Ex Parte* proceedings, the railroads actually exempted some of the competing virgin commodities involved from any increase whatsoever, or they favored them with rate holddowns.

Thus, merely because the Commission finally recently exempted wastepaper, textile wastes and nonferrous metal scrap from the 7% increase involved in

[2] At pages 6, 7.

Ex Parte 310, this case involving *Ex Parte 281* was in no sense or manner thereby rendered moot. First of all, some of the competing virgin commodities involved were again exempted by the railroads from any increase in *Ex Parte 310.* But, irrespective of that, the Commission's exclusion of recyclables from the 7% increase did not nearly serve to eliminate the historic rate distortions mentioned above which still inexplicably favor the high-priced virgin commodities and penalize the low-priced competing recyclables. Those gross rate distortions are largely still in effect, so irrespective of what the Commission did in *Ex Parte 310* in 1975, its actions in 1972 and 1973 in *Ex Parte 281* are still anything but moot, and they continue to cry out for remedial relief in this case.

CONCLUSION

The pending "Suggestion of Mootness" should be rejected. The Court should proceed to pass first on the threshold *jurisdictional* issue; and if it then decides jurisdiction lies, the Court should proceed with a decision on the merits under the National Environmental Policy Act and other related federal statutes. If, for any reason, the Court intends seriously to consider the said "Suggestion of Mootness" then appellees NARI, et al. hereby move for rehearing and reargument with reference to that issue not discussed during oral argument.

Respectfully submitted:

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1675

APR 16

No. 73-1966

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

ABERDEEN AND ROCKFISH RAILROAD COMPANY, *et al.*,
Appellants,

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MEMORANDUM OF THE ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL., RESPECTING THE SUGGESTION OF MOOTNESS

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April 1975

IN THE

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No. 73-1966

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MEMORANDUM OF THE ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL., RESPECTING THE SUGGESTION OF MOOTNESS

SCRAP-EDF have filed a post-argument memorandum suggesting mootness. For the reasons stated below, the appellant railroads believe that the case is not moot; they reiterate that any dismissal of the appeal on mootness grounds should include vacation of the judgment below and a directive that the case be dismissed by the District Court; and they oppose most emphatically any suggestion that the case be remanded for further consideration of the mootness question.

First, the appellant railroads do not believe that this case can be deemed moot. The practical likelihood that the ICC would reach a different result in *Ex Parte No. 281* after the further elaborate proceedings contemplated by the District Court is now remote; in two subsequent environmental impact statements deemed more extensive by SCRAP-EDF, the ICC has reached essentially the same conclusion that such limited increases on recyclables will not have a significant adverse effect on the environment. Nevertheless, the possibility of a different result is normally sufficient to prevent a claim of mootness.

Second, if nevertheless the Court does determine that the case is moot, the railroads urge again that any dismissal of the appeal on mootness grounds be accompanied by an order vacating the judgment below and directing dismissal of the case in the District Court.[1] In their reply brief (pp. 4-5), the railroads set forth the authorities that confirm that "the established practice of the Court . . . is to reverse or vacate" the judgment below when a case becomes moot on appeal. The SCRAP-EDF memorandum (p. 5) appears to acknowledge this rule.

Third, the railroads strongly oppose the alternative suggestion of SCRAP-EDF (p. 5) that the case might be remanded to the lower court for a further inquiry into the mootness issue. The grounds asserted by

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[1] This would not, of course, invalidate the existing orders in *Ex Parte No. 281*. Those orders are a necessary element in the railroads' present rate structure. The fact that there have been subsequent rate increases since that time does not alter the matter, because such subsequent increases are normally expressed in terms that assume the existence of the rates established in prior proceedings such as *Ex Parte No. 281*.

SCRAP-EDF for dismissing the case as moot involve no factual inquiry and can be resolved by this Court quite as easily as by the District Court. This litigation involving *Ex Parte No. 281* has now been pending since May 1972; the case has just been briefed and argued in this Court; and it is appropriate that the case be finally resolved now, either on the merits or on mootness grounds, without yet another round of briefs, arguments, and further proceedings in the District Court.

Respectfully submitted,

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April 1975

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1971

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE APPELLANTS REGARDING THE SUGGESTION OF MOOTNESS

Appellees SCRAP, *et al.* (but not appellees ISIS and NARI) have suggested that this case is moot because, if the district court's judgment is affirmed, the Commission will reexamine the railroads' need for revenue, the rate structure, and the environmental concerns as they stood during 1972 and 1973, the time during which the increases in Ex Parte No. 281 were under original consideration. For the reasons discussed below, we submit that this case is not moot.

573-254—75——1

1. Although, under the district court's order, the Commission's inquiry would be directed to the relevant considerations as they were in 1972 and 1973, if the Commission concluded after this new inquiry that the increases originally permitted were not just and reasonable it would not only order the rates to be reduced but also direct the railroads to refund any excessive rates they have collected.[1] The possibility that the Commission would make such an order is more than adequate to assure that this is a live controversy, particularly since the district court warned that if the Commission did not order a rate reduction upon remand it might be compelled to set aside the Commission's action.[2]

In this proceeding, the Commission gave careful and thorough consideration to the environmental consequences of the rate increases on recyclables and concluded that there would be no significant environmental impact—a conclusion confirmed by the impact statement issued subsequently in Ex Parte No. 295. To the extent that appellees' suggestion of mootness rests

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[1] See J.S. App. 2d (341 I.C.C. 295) where the Commission stated that "[b]oth the surcharge and the selective increase proposals were made subject to a provision for refunds in the event the Commission ultimately finds that no increase or a lesser increase is warranted * * *." The Commission also stated (J.S. App. 39d, 341 I.C.C. 332) t hat "where maladjustments are found to exist an adequate remedy by way of refund or reparations will be provided." See 49 U.S.C. 13(1), 16(1) and 16(2).

[2] The district court stated (J.S. App. 50a): "We indeed might well question whether the Commission can allow the recyclable rate increases without clearly giving 'insufficient weight to environmental values.'"

on the improbability of the Commission's reaching a different result upon remand in Ex Parte No. 281, this is an argument that the district court erred in ordering the Commission to begin these proceedings anew, not an argument that the case is moot.

2. The rates currently being collected by railroads are established by tariffs that are cumulative in effect. They consist of a base rate and a series of adjustments or percentage increases authorized in general revenue proceedings. Each additional increase augments the previous base plus previous increases.[3] If the Commission were to determine, after the proceedings the district court has ordered it to undertake, that the increases in Ex Parte No. 281 are unlawful, this decision would reduce not only the rates collected in 1972 and 1973 but also the rates currently being collected.

3. In any event, even if reconsideration by the Commission of its order in Ex Parte No. 281 could have no present effect, the case would not be moot because the questions presented are recurring ones, capable of repetition yet potentially evading review. In recent years, railroads have been initiating general revenue proceedings at the rate of more than one per year.[4]

[3] In every general revenue proceeding the Commission directs the railroads to record in their tariffs that the rates have been increased by, and are collected under the authority of, the general revenue proceeding. See 341 I.C.C. 571.

[4] Since Ex Parte No. 281, which is involved here, there have been five general revenue proceedings: Ex Parte No. 295 (filed September 24, 1973); Ex Parte No. 299 (filed August 15, 1973); Ex Parte No. 303 (filed January 7, 1974); Ex Parte No. 305 (filed April 22, 1974); Ex Parte No. 310 (filed November 15, 1974).

The issues posed in this case will affect these proceedings. See *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U.S. 498 (a case is not moot, even though the Commission's order has expired, because similar controversies might arise in the future).

Because it believes the decision below is incorrect, the Commission has continued to make the kind of environmental inquiries in general revenue proceedings that it made in this case, without conducting an in-depth examination of the underlying rate structure, which it is thoroughly investigating in Ex Parte No. 270 (J.S. App. 37a-38a, n. 44). Appellee NARI has commenced judicial proceedings against the Commission's decision in another general revenue proceeding (Ex Parte No. 295, Sub-No. 1), based in part upon this alleged flaw, which the district court here termed the "most fundamental and important deficiency" (J.S. App. 34a). Moreover, the Commission continues to assert that it has authority to conduct environmental investigations without entertaining oral hearings. The questions presented by this case and argued before the Court will survive and continue to be litigated unless they are resolved here.

Respectfully submitted.

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APRIL 1975.

U.S. GOVERNMENT PRINTING OFFICE: 1975

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ABERDEEN & ROCKFISH RAILROAD CO. ET AL. *v.* STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (SCRAP) ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 73–1966. Argued March 26, 1975—Decided June 24, 1975*

In December 1971, the Nation's railroads, citing sharply increasing costs and decreasing or negative profits, collectively proposed to file tariffs increasing their freight rates by a temporary surcharge across the board. The Interstate Commerce Commission (ICC), in the ensuing general revenue proceeding, finding that the railroads had a critical and immediate need for revenue, declined to exercise its power to suspend proposed rate increases, and the surcharge became effective in February 1972. The railroads shortly filed for larger, selective rate increases, but in April 1972 the ICC suspended the effectiveness of these increases pending its investigation of their lawfulness, the ICC the previous month having served a brief draft environmental impact statement on all parties to the investigation, discussing the environmental consequences of rate increases with respect to recyclables in general terms and concluding that there was no basis yet to believe that the environment would be substantially affected thereby. Thereafter, appellee SCRAP and other environmental groups filed suit alleging that the ICC had decided not to suspend the surcharge pending its investigation—which decision would have a substantial effect on the environment—without preparing an environmental impact statement or considering environmental issues as required by the National Environmental Policy Act (NEPA); that the pre-existing rate structure discriminated against recyclables and in favor

*Together with No. 73–1971, *United States et al.* v. *Students Challenging Regulatory Agency Procedures (SCRAP) et al.*, also on appeal from the same court.

of virgin materials; and that the surcharge exacerbated this situation with the unfortunate consequence to the environment that use of recyclable materials would be inhibited and use of virgin materials encouraged. A three-judge District Court was convened under 28 U. S. C. § 2325 (now repealed), which required that an injunction restraining the enforcement, operation, or execution of an ICC order would not be granted unless the application therefor was heard and determined by a three-judge court, and relief was granted. On direct appeal, this Court reversed in *United States* v. *SCRAP*, 412 U. S. 669 (*SCRAP I*), holding that § 15 (7) of the Interstate Commerce Act lodges in the ICC *exclusive* power to suspend rate increases pending final determination of their lawfulness. Meanwhile, in October 1972, after an oral hearing, the ICC issued a final report declining to declare the selective rate increases unlawful, terminating the previously entered suspension order, canceling the surcharge that had been subsumed in the selective increases, and ordering a ceiling on rate increases with respect to some but not all recyclables. The report stated that having given extensive consideration to environmental factors, the ICC would not file a separate, formal impact statement under the NEPA, and pointed out that the ICC had begun a separate investigation into the entire rate structure focusing on whether it interfered with the Government's environmental program. However, in November 1972, the ICC reopened its investigation into the lawfulness of selective rate increases to reconsider the environmental effects of the new rates on recyclables, such rates being suspended for an additional period with the railroads' consent. In March 1973 the ICC served an expanded draft impact statement, and in May 1973 issued a final impact statement, concluding that its order of October 1972 had been correct, and finally terminating its investigation without declaring any of the proposed rates unlawful except as previously provided in the October 1972 order. In May 1973, shortly before the increased rates on recyclables were to become effective, appellees SCRAP and Environmental Defense Fund (EDF) filed a motion for a preliminary injunction to restrain the implementation of increased rates on recyclables, and the three-judge court granted the motion. The railroads and the ICC appealed, and in June 1973, THE CHIEF JUSTICE stayed the order on the railroads' motion, and the full Court declined to vacate the stay, 413 U. S. 917, with the result that the increased rates on recyclables went into, and remain in, effect. In November 1973 this Court vacated

Syllabus

the preliminary injunction and remanded the cases for reconsideration, 414 U. S. 1035. Meanwhile, appellees had filed motions for summary judgment in the three-judge court. Finding that the ICC had failed to comply with the NEPA, in that, *inter alia*, it failed to hold an oral hearing before adopting the final impact statement, having previously held such a hearing (presumptively an "existing agency review process") before issuing its October 1972 order, and should have started over again after it decided to issue a final impact statement, that court set aside the ICC order terminating the general revenue proceeding without declaring the rate increases unlawful and ordered the ICC to reopen the proceeding, prepare a new impact statement under the NEPA, hold hearings and reconsider, in light of the new statement, its determination to declare the rate increases on recyclables lawful. The railroads appealed, claiming that the District Court had no jurisdiction over the case, and that the ICC had, in any event, fully complied with the NEPA, and the ICC appealed, claiming only that the ICC had so complied with the NEPA. *Held:*

1. This Court has jurisdiction over the appeals under 28 U. S. C. § 1253, which gives this Court jurisdiction to determine appeals from "an order granting or denying . . . an . . . injunction in any civil action required . . . to be heard and determined" by a three-judge district court, since the District Court's order, which not only declared that the ICC had failed to comply with the NEPA but also *directed* the ICC to perform certain acts, was an "injunction" within the meaning of § 1253, and since, moreover, such order restrained "the enforcement, operation or execution" of the ICC order within the meaning of 28 U. S. C. § 2325, and hence could have been issued only by a three-judge court. Pp. 13–15.

2. The District Court had jurisdiction to review the ICC's decision not to declare the increased rates unlawful, notwithstanding such decision was made in a general revenue proceeding. Pp. 16–25.

(a) There is no merit to the railroads' argument that the ICC's decision is just as much an interim decision as a decision not to *suspend* a particular rate pending investigation, and hence is unreviewable under *SCRAP I, supra*. Since the District Court did not enjoin collection of the rates so as to come within the rule barring courts from entering disruptive injunctions against collection of rates not finally declared unlawful by the ICC, the rule of *SCRAP I* is not applicable even if what the railroads say is true. P. 23.

Syllabus

(b) Nor is there any merit to the railroads' argument (1) that, treating the District Court's decision as a review of whether the record supported the ICC's decision not to suspend the rates as to recyclables, the District Court reviewed an issue not yet decided finally by the ICC in violation of the principles of finality and exhaustion of remedies, and (2) that the District Court's conclusion that the rule against review of general revenue proceedings does not apply to NEPA cases is contrary to the decision in *SCRAP I* that the NEPA does not change pre-existing jurisdictional rules. Here the issue as to whether the ICC had adequately considered under the NEPA environmental factors in the general revenue proceeding, had already been finally decided by the ICC and the relief sought from and granted by the District Court could not have been obtained from the ICC in a subsequent proceeding under § 13 of the Interstate Commerce Act. While the interim nature of a general revenue proceeding may be relevant to the extent of the consideration of environmental factors required, its nature does not prevent review of the question, finally decided by the ICC, whether the environmental impact statement prepared for that proceeding is adequate. When agency consideration of environmental factors in connection with major "federal action" is complete, notions of finality and exhaustion do not bar judicial review of the adequacy of such consideration, even though other aspects of the rate increase are not ripe for review. Pp. 23–25.

3. The District Court erred in deciding that the oral hearing that the ICC held prior to its October 1972 order was an "existing agency review process" during which a final environmental impact statement should have been available. The NEPA provides that a formal impact statement "shall accompany the proposal through the existing agency review processes," and hence does not affect the time when the "statement" must be prepared, but simply provides what must be done with the "statement" once it is prepared. Under *this* provision the time at which the agency must prepare the final "statement" is the time at which it makes a recommendation or report on a *proposal* for federal action. Here, until the October 1972 report, the ICC had made no proposal, and hence the earliest time at which the *statute* required a statement was the time of the October 1972 report—sometime after the oral hearing. Pp. 25–26.

4. The District Court also erred in deciding that the ICC should have "started over again" after it decided to propose a formal

impact statement, even assuming that the ICC erred in failing to prepare a separate impact statement to accompany its October 1972 report or that the consideration given to environmental factors in that report was inadequate. To the extent that such decision is based on the court's belief that the March 1972 draft impact statement had to be considered at a hearing, it is incorrect, since it appears that the consultation with environmentally expert agencies required by the NEPA occurred from the outset, that environmental issues pervaded the hearings held, and that all draft impact statements were circulated before the hearings, thus indicating that *procedurally* the NEPA was thoroughly complied with to the time of the October 1972 report. And to the extent that such decision is based on the court's belief that the ICC did not in good faith reconsider its October 1972 order in light of the impact statement, it is without support in the record, since the ICC (as it in fact proceeded to do) was in as good a position to correct a statutory error by integrating environmental factors into its reopened investigation and into its May 1973 decision, as it would have been if the October 1972 report had never been written. Pp. 27–28.

5. The District Court further erred in concluding that the final environmental impact statement was deficient. Pp. 28–33.

(a) As in most general revenue proceedings, the "action" taken by the ICC was in response to the railroads' claim of a financial crisis, and the inquiry was primarily into whether such a crisis—usually entitling the railroads to a general increase—existed, leaving *primarily* to more appropriate future proceedings the task of answering challenges to rates on individual commodities or categories thereof, the latter question—usually involved in a general revenue proceeding only to a limited extent—raising the most serious environmental issues, and the former question raising few such issues, none of which are claimed here to have been inadequately addressed in the impact statement. Pp. 28–29.

(b) There is no merit to the appellees' argument that the environmental consequences flowing from a facially neutral rate increase, which, when superimposed on an underlying rate structure, allegedly discriminates against recyclables, must be explored in an impact statement and can be explored only by analyzing the underlying rate structure; and that, moreover, the ICC has been tardy in complying with the NEPA, was required to analyze the underlying rate structure only once with a view toward environmental consequences, had plenty of time and cause to do so

before its general revenue proceeding, and therefore should not have been permitted to terminate that proceeding without having done so. Such argument is not only contrary to the holding in *United States* v. *Louisiana*, 290 U. S. 70, giving the ICC wide discretion to decide what issues to address in a general revenue proceeding and to postpone comprehensive consideration of discrimination claims, but it also loses force in view of the fact that the ICC had already begun an investigation of the underlying rate structure before commencing its investigation in the general revenue proceeding and had started to consider environmental issues in the former investigation before the District Court's decision. Thus, even if the NEPA were read to require the ICC to address comprehensively the underlying rate structure at least once before approving a facially neutral general rate increase, no purpose could have been served by ordering it to explore the discrimination question in the general revenue proceeding when it was already doing so in a more appropriate proceeding. Pp. 30–31.

(c) The District Court's decision to deem the "federal action" involved in the general revenue proceeding to include an implicit approval of the underlying rate structure was inaccurate and led it to an entirely unwarranted intrusion into an apparently sensible decision by the ICC to take much more limited "action" in that proceeding and to undertake the larger action in a *separate* proceeding better suited to the task. Pp. 31–32.

(d) In view of the scope of the "federal action" being taken by the ICC in the general revenue proceeding, the District Court was incorrect in holding that the final impact statement inadequately explored the underlying rate structure and the *extent* to which the use of recyclables will be affected by the rate structure. Pp. 32–33.

371 F. Supp. 1291, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. DOUGLAS, J., filed an opinion dissenting in part. POWELL, J., took no part in the consideration or decision of the cases.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 73–1966 AND 73–1971

Aberdeen and Rockfish Railroad Company et al., Appellants,
73–1966 *v.*
Students Challenging Regulatory Agency Procedures (S. C. R. A. P.) et al.

United States et al., Appellants,
73–1971 *v.*
Students Challenging Regulatory Agency Procedures (S. C. R. A. P.) et al.

On Appeal from the United States District Court for the District of Columbia.

[June 24, 1975]

MR. JUSTICE WHITE delivered the opinion of the Court.

The Nation's railroads, the United States and the Interstate Commerce Commission (ICC) appeal from the judgment of a three-judge federal court which set aside an ICC order terminating a general revenue proceeding without declaring unlawful certain rate increases filed by the Nation's railroads with the ICC. The order directed the ICC to reopen the proceeding, prepare a better environmental impact statement under the National Environmental Policy Act [NEPA], 42 U. S. C. § 4332 (2)(c), hold hearings and reconsider, in light of the new

impact statement, its determination not to declare the rate increases applicable to recyclables [1] unlawful.

The impact statement involved is that required by § 102 of the National Environmental Policy Act, 42 U. S. C. § 4332, set out in the margin.[2] The judgment

[1] The term recyclables will refer throughout this opinion to materials obtained from products which have already been put to one commercial use—for example, iron or steel obtained from a junked automobile.

[2] "[A]ll agencies of the Federal Government shall—

"(A) utilize a systematic interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

"(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality . . . , which will insure that presently unqualified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

"(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

"(i) the environmental impact of the proposed action,

"(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

"(iii) alternatives to the proposed action,

"(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

"(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

"Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President,

was based on the three-judge court's view that the 150 printed page impact statement prepared by the ICC in connection with the general revenue proceeding insufficiently considered certain environmental issues and thus failed to comply with the mandate of subdivision (C) of § 102 of NEPA; and that failure of the ICC to hold hearings after preparing a draft of the statement violated the command of the statute that the statement "accompany the proposal through the existing agency review processes." Because we believe that the District Court erred in several respects, we reverse.

I

This lawsuit has a lengthy history, a brief summary of which is necessary to an understanding of the issues presented by this appeal. In December 1971, citing sharply increasing costs and decreasing or negative profits, the Nation's railroads collectively proposed to file tariffs increasing their freight rates by 2.5% across the board. The "surcharge" was stated to be temporary and was to be followed by a filing for larger, somewhat selective rate increases. Finding that the railroads had a critical and immediate need for revenue, the ICC declined to exercise its power to suspend proposed rate increases under 49 U. S. C. § 15 (7) and the surcharge became effective on February 5, 1972. On March 17, 1972, the railroads filed their selective increase proposal, which would result in an average increase across the board of 4.1% over the rates pre-existing the surcharge—these new selective increases to become effective on May 1, 1972. Meanwhile, the ICC had directed the railroads to file an environmental impact statement with respect to the rate increases and to

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the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes; . . ."

serve it on interested parties. This was done on January 3, 1972, and those served included appellee SCRAP. Numerous comments were received in response to this statement. On April 24, 1972, the ICC suspended the effectiveness of the selective increases for the maximum allowable seven-month-period under 49 U. S. C. § 15 (7), until November 30, 1972, pending its investigation, styled *Ex parte 281,* into their lawfulness. On March 6, 1972, the ICC served a brief draft environmental impact statement of its own on all parties to *Ex parte 281,* including appellees and the Council on Environmental Quality (CEQ), Environmental Protection Agency (EPA), and the Department of Transportation. The statement discussed environmental consequences of rate increases with respect to recyclables in general terms and concluded that the ICC had no basis yet to believe that the environment would be substantially affected thereby.

Thereafter, while the selective rates were suspended but the surcharge was being collected, a group of law students—Students Challenging Regulatory Agency Procedure (SCRAP)—and other environmental groups filed the instant lawsuit alleging that the ICC had made a decision not to suspend the 2.5% surcharge pending its investigation—which decision would have a substantial effect on the environment—without preparing an environmental impact statement or considering environmental issues, as required by NEPA. Appellees claimed that the pre-existing rate structure discriminated against recyclables and in favor of virgin materials, and that the across-the-board rate surcharge exacerbated this situation with the unfortunate consequence to the environment that use of recyclable materials would be inhibited and use of virgin materials encouraged. The complaint sought to compel the ICC to suspend the rate surcharge and to enjoin the railroads from collecting it.

A three-judge court was therefore convened under 28 U. S. C. § 2325, which has since been repealed. Relief was granted. On direct appeal under 28 U. S. C. § 1253, this Court reversed, holding that under the doctrine of *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U. S. 658 (1963), § 15 (7) of Title 49 U. S. C., lodges in the ICC *exclusive* power to suspend rate increases pending final determination of their lawfulness. *United States* v. *SCRAP*, 412 U. S. 669 (*SCRAP I*) (1973).

Meanwhile, on October 4, 1972, the ICC issued a final report dated September 27, 1972, declining, in the main, to declare unlawful the selective rate increases, and terminating the suspension order previously entered. The surcharge was cancelled, those increases having been subsumed in the selective increases. The report, which was prepared after extensive written responses to the draft environmental impact statement had been submitted by various government and nongovernment agencies and after oral hearings had been held, covers 92 printed pages, 17 of which deal with the question whether the railroads were in need of additional revenue; 15 of which deal with general environmental consequences which might flow from the increases; and 36 of which deal with the environmental consequences to flow from specific increases in rates on specific recyclable materials.

The report noted that the "principal issue" in a general revenue proceeding is whether the railroads are in need of additional revenue; and concluded that the railroads had demonstrated overwhelmingly that they were. It then stated that there were two possible adverse affects on the environment which might flow from failure to declare the increases unlawful. First, the increase in rail rates might divert traffic to trucks, which are allegedly heavier polluters than trains. Second, the increase in rates for recyclables might discourage their use resulting in increased solid waste—disposal of which

creates environmental problems—and an accelerated depleting of the country's natural resources. The danger of diversion to truck traffic was considered insubstantial for several reasons among which were the fact that truck rates had increased due to similar increases in costs and the fact that the rate increases sought by the railroads were permissive and would not be used with respect to commodities which would be diverted to trucks. Moreover, any danger of diversion was plainly outweighed by the fact that the railroads needed money and would eventually go out of business without the increases.[3]

With respect to recyclables, the report emphasized that time is of the essence in general revenue proceedings in light of the claim of need by the railroads to immediate revenue and that their entitlement to the overall increase usually follows from a showing of such need. The consideration of other factors is therefore necessarily abbreviated and their further analysis is postponed to specialized proceedings more appropriate for their in-depth consideration, such as proceedings incident to individual complaints filed under § 13 (1) asserting that a particular rate or group of rates, such as rates on recyclables, are unjust and unreasonable, too high in relation to other rates or otherwise illegal under the applicable law. Indeed, the report pointed out that the ICC had itself begun *Ex parte 270*, a separate comprehensive investigation into the entire rate structure and was there focusing on the question whether the rate pattern interfered with the Government's environmental program. The report noted that there were limits on the extent to which the applicable provisions of the Transportation Act would permit special rates for recyclables or allow the ICC to require the railroads to subsidize their transportation. Applying standard ratemaking cri-

[3] None of the appellees nor the court below fault the ICC's analysis of this problem. It has, therefore, dropped out of the case.

teria, the report rejected, on the basis of the information then before it, the claim that the underlying rate structure discriminated against recyclables. It also concluded that the use of recyclables, particularly ferrous scrap, was not responsive to rate increases—particularly when accompanied by similiar rate increases applicable to competing virgin materials. The ICC ordered a 3% ceiling on increases with respect to some, but not all,[4] recyclables, and concluded that there was no reason for finally determining in the context of a general revenue proceeding whether the rate structure, with or without the scheduled increases, was unjust and unreasonable or illegally discriminatory. The report also stated that having given extensive consideration to environmental factors, *United States* v. *SCRAP*, 412 U. S., at 683 n. 11, the Commission would not file a separate, formal environmental impact statement under subsection 2 (C) of NEPA.

The report indicated that the increases on nonrecyclables would become effective on 15 days notice from the railroads and that the increases on recyclables would become effective on 35 days notice. The increased period for recyclables was set so that interested parties would have the opportunity to comment on the report. The ICC issued an order to that effect on October 4, 1972.

In response to comments which were filed by several parties, the ICC reopened *Ex parte 281* on November 7, 1972, to reconsider the environmental effects of the new rates on recyclables in light of a fuller written consideration of these issues. The new rates on recyclables were suspended with the consent of the railroads for an additional seven months until June 10, 1973.

On March 13, 1973, the ICC served an expanded draft environmental impact statement. Comments were thereafter received from EPA, CEQ, the Department of Trans-

[4] The increases with respect to ferrous scrap were not held down.

portation, all of the appellees herein and others. On May 1, 1973, the ICC issued a final impact statement covering 150 printed pages, with an additional 21-page bibliography. The main difference between the October 4, 1972, report and the impact statement was that the latter substantially expanded on the discussion of the underlying rate structure and the effect of rate increases on each of the recycling industries. With respect to the underlying rate structure, the conclusion in the light of the then available information and under the controlling ratemaking principles was that it did not discriminate. The statement examined factors affecting the price of each recyclable commodity and factors other than price affecting the demand for such commodities. It was again concluded that freight rate increases affect such demand only negligibly. The ICC re-emphasized that in general revenue procedings analysis might fall short of what might transpire in other kinds of proceedings, under § 13 or in the Commission's own *Ex parte 270*, to which attention was again called.[5] The conclusion of the ICC was that its order of October 4 had been correct; *Ex parte 281* was therefore finally terminated without declaring any of the proposed rates unlawful except as previously provided in the October 4 order.[6]

On May 30, 1973, 11 days before the increased rates on

[5] Following the form implied by the statute, the statement included separate sections for each of the questions set forth in 42 U. S. C. § 4332 (C)(i)–(v). The statement concluded that the ICC's action would have no long-term or irreversible effects. It also concluded that, as an alternative, Congress might choose to subsidize recyclables in ways which did not place the burden of such subsidy on the railroads or shippers of virgin materials.

[6] Commissioner Brown felt that the statement gave ample consideration to environmental matters but that the Commission should have decided, on the basis of the statement, to declare all increases on recyclables unlawful. Commissioner Deason also dissented.

recyclables were to become effective, appellees SCRAP and EDF filed a motion—apparently in the context of their earlier filed complaint against the surcharge—for a preliminary injunction restraining the implementation of the freight rate increases with respect to recyclables. On June 7, 1973, the three-judge court entered an order temporarily enjoining the railroads from collecting the rates declaring, without any explanation whatever, that such order would "not substantially harm the railroads."[7] The railroads and the ICC filed appeals. On June 8, 1973, THE CHIEF JUSTICE stayed the order upon the railroads' motion. On June 25, 1973, the full Court declined to vacate the stay on motion by appellees SCRAP and EDF, 413 U. S. 917. The increases in recyclables were then placed into effect and continue in effect today. On November 19, 1973, this Court vacated the preliminary injunction and remanded the cases for reconsideration in light of *Atchison, Topeka & Santa Fe R. Co.* v. *Wichita Board of Trade*, 412 U. S. 800 (1973), 414 U. S. 1035–1036.[8]

Meanwhile appellees had filed motions for summary

[7] Under the Act, increased rates which are suspended will never be collected for the period of the suspension. Increased rates which are collected are subject to refund if later determined to be unlawful. 49 U. S. C. §§ 15 (7), 13.

[8] In *Wichita*, the Commission had approved certain increased charges proposed by the railroad. Finding the reasons given by the Commission for its approval to be inadequate to explain a departure from a longstanding rule which would have invalidated the charges, the District Court vacated the Commission's order, remanded for further proceedings and enjoined the collection of the increased charges pending such proceedings. Seven Justices of this Court voted to reverse the granting of the injunctive relief, four on the basis of equitable considerations related to the doctrine of primary jurisdiction and three on the ground that such relief is barred by the doctrine of *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U. S. 658, see discussion, *supra*, at —, absent a declaration of unlawfulness by the Commission.

judgment before the three-judge court seeking (a) a declaration that the ICC's orders declining to declare the rate increases unlawful were themselves unlawful because the environmental impact statement was inadequate, and an order directing the ICC to reconsider its decision in light of a better impact statement; and (b) a permanent injunction restraining collection of the rate increases on recyclables by the railroads. Over a dissent, the District Court vacated the order of the ICC terminating *Ex parte 281* without declaring the increases unlawful and ordered it to prepare a new impact statement, hold hearings on the statement, and reconsider its decision not to find the rates unlawful. It declined to enjoin collection of the rates in the interim.

The court first rejected the applicability of the line of lower court cases, beginning with *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487 (ED Va. 1935) and holding decisions of the ICC not to declare proposed increased rates unlawful *in general revenue proceedings* to be unreviewable. The court noted that this Court had divided evenly in *Atlantic City Electric Co.* v. *United States*, 306 F. Supp. 338 (SDNY 1969); and *Alabama Power Co.* v. *United States*, 316 F. Supp. 337 (DC 1970) aff'd, 400 U. S. 73 (1970) and that the rule against reviewability of general revenue proceedings was therefore of questionable vitality—especially where the issue presented for review is not the reasonableness of a particular rate but the general question whether the railroads' revenue needs justify environmental costs. However, the court rested its holding on the ground that this is a NEPA case. It said that unlike shippers, who may properly be made to exhaust their remedies under 49 U. S. C. §§ 13 and 15 by seeking refunds, environmental groups *may* not have such remedies. Moreover, environmental issues are better considered at a single general

revenue proceeding than at countless individual § 13 proceedings and their resolution must be reviewed promptly in order to avoid irreparable damage to the environment. Environmental degradation occurring while a § 13 proceeding is pending is irreparable, unlike injury to shippers which can be cured by reparations.

The court then found that the ICC had failed to comply with NEPA in two respects. First, no oral hearing had been held after circulation of the second draft impact statement on March 13, 1973, and before the preparation of the final impact statement. The court conceded that NEPA does not require the holding of hearings which the agency does not otherwise hold; and that the ICC is not required to hold hearings in a general revenue proceeding, *United States* v. *Florida East Coast R. Co.*, 410 U. S. 224. However, it ruled that since the ICC held an oral hearing before adopting its October 4, 1972 report, such a hearing was therefore presumptively an "existing agency review process" and one should have been held before adopting the final environmental impact statement on May 1, 1973. Moreover, the ICC had simply reconsidered its October 4, 1972, decision in light of the impact statement, instead of starting all over again from the beginning. In order to start over again, it had to consider its impact statement at an oral hearing. Second, the court concluded that the report did not give "good faith" consideration to environmental factors. The court viewed the tone of the impact statement as "combative, defensive and advocatory"; it criticized the ICC for refusing to find in NEPA a congressional expression that it should invalidate rates otherwise just and reasonable on the ground that the rates would negatively affect the environment; and it criticized the ICC for refusing to change its analysis even after other government agencies commented unfavorably on the statement.

It held the statement deficient in two respects. First, it held that the statement did not sufficiently analyze the underlying rate structure and that the ICC had instead considered *only* the impact of the increase involved in *Ex parte 281*. Second, the ICC should have more extensively explored the quantitative response of recycling businesses to freight rates by conducting a "rigorous price sensitivity study" and by analyzing whether industry would develop new technology to utilize secondary materials if encouraged to do so by lower transportation costs.

The court then vacated the orders of the ICC, which had terminated *Ex parte 281* without declaring the rate increases unlawful, and ordered the ICC to prepare a new impact statement analyzing the underlying rate structure, the elasticity of demand for recyclables, and the probability of encouraging new technology in the use of scrap. It ordered the ICC to hold hearings after circulating the new impact statement and to fully consider anew in light of the new statement and the hearing whether the increased rates should be declared unlawful. The court declined to enjoin the collection of the rates, while claiming that it could have and probably should have notwithstanding *Atchison, Topeka & Santa Fe R. Co.* v. *Wichita Board of Trade, supra.*[9]

The railroads appeal claiming that the District Court had no jurisdiction over this case, and that the ICC had, in any event, fully complied with NEPA. The ICC appeals claiming only that the ICC has fully complied with NEPA. We noted probable jurisdiction in both cases. 419 U. S. 822.

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[9] In light of the fact that the court remanded to the Commission for further proceedings as to the lawfulness of the increase, injunctive relief was precluded by *SCRAP I*, which held the district courts are without power to suspend *pending* a determination of lawfulness *by the Commission*.

II

At the outset we face a challenge to our appellate jurisdiction. Under § 2325, now repealed [10] of Title 28 a three-judge court was required to grant "an interlocutory or permanent injunction restraining the enforcement, operation or execution in whole or in part, of any order of the Interstate Commerce Commission." 28 U. S. C. § 1253 gives us jurisdiction to determine appeals from "an order granting or denying . . . an . . . injunction in any civil action required . . . to be heard and determined by a district court of three judges." All parties agree that the action below was a civil action required to be heard and determined by a three-judge court, for appellees sought an injunction restraining collection of the increased rates which the ICC had refused to declare unlawful.

The question under the statutory language is whether the order being appealed from is an "injunction" within the meaning of that word as used in § 1253. Appellees claim that since the court below declined to restrain collection of the increased rates, its order was not an injunction but a declaratory judgment not appealable under § 1253, *e. g.*, *Mitchell* v. *Donovan*, 398 U. S. 427 (1970); *Gunn* v. *University Committee to End the War*, 399 U. S. 383 (1970). But the District Court's order not only declared that the ICC had failed to comply with NEPA, but it also *directed* the ICC to perform certain acts. The order was plainly cast in injunctive terms. The order "directs" the ICC to reopen *Ex parte 281* and to conduct further proceedings which "must" include preparation of an impact statement dealing with enumerated issues. In declining to restrain collection of the rates, the court said it was declining to grant "to plaintiffs *additional* injunc-

[10] After January 2, 1975, review of ICC orders other than orders for the payment of money or in connection with suits to *enforce* ICC orders will be by courts of appeals. Pub. L. 93–584.

tive relief" (emphasis added). Were the order of the District Court left undisturbed, the ICC would hardly be free to decline to prepare a new impact statement or to conduct further proceedings. The order would have as coercive an effect on the ICC, its members and its staff, as could any order of a District Court in a proceeding to review an order of the ICC. This is enough to bring the order of the court below within the meaning of the word "injunction," as used in 28 U. S. C. § 1253.[11]

It is also apparent that the District Court's injunction restrained "the enforcement, operation or execution" of the order of the ICC within the meaning of § 2325 and could therefore have been issued only by a three-judge court. The ICC order of October 4, 1972, reaffirmed on May 1, 1973, declined to declare the general rate increase unlawful, or with minor exceptions to interfere with its collection. That order terminated *Ex parte 281*. The District Court, although it did not enjoin collection of the increased rates, emasculated the ICC order in major respects. Contrary to the order of the ICC, *Ex parte 281*

[11] Appellees argue that the order of the court below is not an injunction because it is not enforceable by contempt. They cite nothing to support this claim and we reject it. The court ordered the ICC, *inter alia*, to prepare another impact statement. Were the ICC to refuse to do so, the court would have no way of enforcing its order other than contempt, and it could not permit its order to be ignored. Moreover, we have repeatedly exercised jurisdiction under § 1253 over appeals from orders, unlike the one entered in this case, not cast in injunctive language but which by their terms simply "set aside" orders of the ICC. *Chicago, M. St. P. & P. R. Co.* v. *United States*, 366 U. S. 745, 746 (1961); *Ayreshire Collieries Corp.* v. *United States*, 331 U. S. 132, 141 (1947); *Electronic Industries Association* v. *United States*, *supra*. Indeed, in *Electronic Industries*, we requested separate briefs on the question whether there was a jurisdictional difference in ICC cases between "injunctions" and orders "setting aside" ICC determinations and concluded that we had jurisdiction over the appeal.

was to be reopened and further proceedings had with respect to the legality of the increased rates. Contrary to the ICC order, the environmental impact statement of the ICC was declared insufficient and a new statement ordered prepared. The District Court's order, as we have said, was in injunctive terms; and it is not tenable to assert that it did not interfere with the operative effect of the ICC order of May 1, 1973.[12]

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[12] The soundness of this conclusion appears even more clearly from the legislative history of 28 U. S. C. § 2325. Before 1948, review of ICC orders was governed by the Urgent Deficiencies Act of 1913. 38 Stat. 220. It provided:

"No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, *or setting aside*, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be *heard and determined by three judges*, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application . . . and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply." (Emphasis supplied.)

As can be seen, the three-judge requirement applied to orders "setting aside" an order of the ICC without in terms requiring as a prerequisite that the enforcement, operation, or execution of the order be restrained. In 1948, as part of the revision and codification of Title 28 and its enactment into positive law, the Urgent Deficiencies Act was replaced by 28 U. S. C. §§ 2321–2325. The reviser's notes, which are authoritative in the construction of the 1948 revision, *United States* v. *National City Lines*, 337 U. S. 78, 81, 82 (1949); *Steinbach* v. *Mo Hock Ke Lok Po*, 336 U. S. 368, 376 n. 12 (1949), state with respect to 28 U. S. C. § 2325, simply that it derives from "Title 28, U. S. C., 1940 ed., § 47 (Oct. 22, 1913, ch. 32, 38 Stat. 220)," which is the Urgent Deficiencies Act. Under the longstanding principle of *United States* v. *Ryder*, 110 U. S. 729, 740 (1884), "it will not be inferred that the legislature, in revising and consolidating the laws, intended to change their policy, unless such intention be clearly ex-

III

The railroads, but not the United States, argue that the District Court had no jurisdiction to review the decision of the ICC made in a general revenue proceeding, not to declare the increased rates unlawful. The argument is supported by a long line of district court decisions, see, *e. g.*, *Algoma Coke & Coal Co.* v. *United States*, 11 F. Supp. 487 (ED Va. 1935); *Koppers Co.* v. *United States*, 132 F. Supp. 159 (WD Pa. 1955); *Florida Citrus Comm'n* v. *United States*, 144 F. Supp. 517 (ND Fla. 1956), aff'd mem., 352 U. S. 1021 (1957); *Atlantic City Electric Co.* v. *United States*, 306 F. Supp. 338 (SDNY 1969); and *Alabama Power Co.* v. *United States*, 316 F. Supp. 337 (DC 1969), both affirmed by an equally divided court, 400 U. S. 73 (1970); *Electronic Industries Association* v. *United States*, 310 F. Supp. 1286 (DC 1970), affirmed *per curiam*, 401 U. S. 967 (1971), and its

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pressed." No such intent is expressed here, and in our view, 28 U. S. C. § 2325 required three judges for entering all orders for which they were required under the Urgent Deficiencies Act, which includes orders setting aside ICC orders. In other words, an order "setting aside" an ICC order inevitably restrains its "enforcement, operation or execution," within the meaning of § 2325, now repealed.

At oral argument, SCRAP contended that under *United States* v. *Griffin*, 303 U. S. 226, 233 (1938), the Urgent Deficiencies Act did not permit review "to set aside every kind of order issued by the Commission" and in particular did not permit review of an order such as the one set aside in this case which simply involved a refusal by the Commission to change the existing status. *Id.*, at 234. Insofar as it rested on the negative order doctrine of *Proctor & Gamble, Co.* v. *United States*, 225 U. S. 282 (1912), *Griffin* is no longer the law. *United States* v. *Jones*, 336 U. S. 641, 647 (1949); *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 145 (1939). Insofar as *Griffin* was based on the notion that the Urgent Deficiencies Act does not apply to challenges to ICC orders entered under the Railway Mail Pay Act, which are in essence suits for money, see *United States* v. *ICC*, 337 U. S. 426, 442 (1949), against the United States, it has no application to this case.

correctness in its application to this case turns in part on an understanding of just what a general revenue proceeding is.

A

Under the Act, the initiative in setting rates remains with the railroads. See *United States* v. *SCRAP*, 412 U. S., at 672. The Commission has the power, after exercise of this initiative by the railroads, and after an investigation either upon its own initiative or upon complaint by an interested party, to declare a rate unlawful if it finds that the rate is unjust, unreasonable, preferential, discriminatory, or otherwise in violation of the Act. 49 U. S. C. §§ 13 and 15. The ICC, and only the ICC, *United States* v. *SCRAP*, *supra*, also has the power to suspend a new rate for up to seven months pending its determination of lawfulness. 49 U. S. C. § 15 (7).[13] Where the increase initiated by a railroad relates only to a single commodity, and where the ICC conducts an investigation, the investigation will be a thorough inquiry into the justness and reasonableness of that particular rate. However, the reason for increasing a particular rate may be a reason, such as across-the-board cost increases, which dictates an increase in virtually all rates by a large number of railroads. In those cases, the railroads have, in the exercise of their initiative, proposed across-the-board increases applicable to all or nearly all of their rates. This Court in *New England Divisions Case*, 261 U. S. 184, 196–198 (1923), recognizing the practical problems which the ICC faced in such a situation, permitted it

[13] Failure to suspend does not always do irreparable harm to shippers who pay the increased rates. Unless the Commission has previously exercised its ancillary power to *set* rates, or prescribe their maxima or minima, *Arizona Grocery Co.* v. *Atchison, Topeka and Santa Fe R. Co.*, 238 U. S. 370 (1932), a shipper may always obtain a refund if he establishes that rates collected after refusal to suspend were unlawful. 49 U. S. C. § 13 (1).

to find the new rates lawful after taking proof relating not to any particular rate but to the reasonableness of the increases in general. In *United States* v. *Louisiana*, 290 U. S. 70, 76–78 (1933), this Court approved of an ICC procedure whereby it permits an across-the-board rate increase to become effective after investigation—by declining to declare it unlawful, and increasing previously set maxima where necessary—*without* a finding that each new rate was lawful and without itself prescribing any of the new rates.[14] This Court, after pointing out the practical impossibility of inquiring into the reasonableness of each rate, stated:

> "[I]n performing the duty broadly to increase carrier revenue, it is enough if the Commission, *in the first instance*, makes such inquiry and investigation as would enable it to say that the prescribed increases when applied to members of the group will *generally* not exceed a reasonable maximum." (Emphasis added.)

The Court went on to say:

> "The extent of this inquiry and the detail of investigation can not be marked by this Court with certainty. The size of the group dealt with, the nature of the traffic, the urgency of the relief demanded, these and other factors should condition the Commission's procedure in each case. But with proper procedure, the ultimate finding that the rates as generally applied are reasonable, supported by evidence and accompanied by suitable reservation of the rights of all interested parties to secure modification of any particular rate which, when challenged, is found to be unjust or unreasonable, complies with

[14] To prescribe the new rates would be to cut off refund claims by injured shippers. *Arizona Grocery Co.* v. *Atchison, Topeka and Santa Fe R. Co.*, *supra*.

the statute. The requirement that increase of rates by Commission action is to be in the exercise of its power to prescribe reasonable rates is thus observed but in conformity to the administrative necessities which the proviso contemplates."

Proceedings, such as that described in *United States* v. *Louisiana* in which the ICC has been called upon to decide whether to prevent a substantially across-the-board rate increase, have become known as general revenue proceedings. The ICC's inquiry has tended to focus on whether the railroads are really in need of increased revenues and have tended to leave for individual rate or refund proceedings under 49 U. S. C. §§ 13 and 15 the problem of determining just which commodities on which runs should bear the increased burden and to what extent. The ICC is careful to leave such refund claims open by including in the general revenue order a statement such as the one included here:

"Thus, we do not attempt to determine whether the particular rates which result from the increases are maximum reasonable rates, nor does the order constitute a prescription of rates within the meaning of the decision in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370. If individual rates or groups of rates are believed to be unjust and unreasonable, a shipper or other interested persons has an administrative remedy available in sections 13 and 15 of the Interstate Commerce Act, 49 U. S. C. §§ 13 and 15." 346 I. C. C., at 103 (A. 25).

Of course, the ICC has the power in a general revenue proceeding to declare the new rates unlawful and disapprove the increase. It could also, if it chose, declare some of the rates discriminatory, unreasonable or otherwise unlawful; and it could itself affirmatively approve all or some of the rates as just and reasonable. But

under the *Louisiana* case, the general rule has been that the ICC may confine its attention in general revenue proceedings almost entirely to the need for revenue and to any other factors that relate to the legality of the general increase as a whole; and it follows *a fortiori* that if attention is given to other issues, that attention may be of a limited nature.

The instant proceeding in which substantially all of this country's railroads sought increases in substantially all of their rates based upon alleged cost increases which placed them in a financial crisis, plainly qualifies as a general revenue proceeding. Environmental issues aside, the ICC true to form, devoted most of its investigation to the issue of the railroads' revenue needs, but did inquire to some extent into the reasonableness of the increases as applied to certain broad categories of charges.

In *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487 (ED Va. 1935), shippers of coal sought review in a three-judge court of the decision of the ICC in a general revenue proceeding not to declare the proposed increase unlawful in so far as it applied to coal. The claim was that the increased rates on coal were unjust and unreasonable. The court declined to set aside the rate increases. It pointed out that the ICC's order was permissive only—it simply declined to prevent the rate increases.[15] It then stated that the ICC had not yet decided whether the increased rates on *coal specifically* were just and reasonable but had decided only that the railroad's revenue needs rendered the *general* increase reasonable; and that the plaintiffs had a procedure available to them—a complaint under § 13 seeking a refund and a declaration of unjustness or unreasonableness from the ICC—in which it could cause the ICC to

[15] Insofar as the court's decision rested on the fact that the ICC's decision was a negative one, it is inconsistent with *Rochester Tel. Corp.* v. *United States*, *supra*, n. 12.

decide whether the new coal rates were just and reasonable. As the ICC had not yet addressed the question presented by the plaintiffs to the court, the court declined to decide it.[16] The court also held that the decision of the ICC was in essence one not to *suspend* the rate increases and that the courts had no power to suspend if the ICC did not do so. *Board of Railroad Comm'rs* v. *Great Northern R. Co.*, 281 U. S. 412 (1930). See also *United States* v. *SCRAP*, *supra*.

Since the *Algoma* decision, shippers seeking to undo, with respect to particular commodities, a decision by the ICC in a general revenue proceeding not to declare rate increases unlawful, have been uniformly unsuccessful. In those cases in which the shipper claimed only that the increase on a particular commodity was unjust or unreasonable—without addressing the question whether a general increase of some sort was justified—the courts have declined to rule on the issue posed for the reason that the ICC had not yet addressed it. *Koppers Co. v. United States*, 132 F. Supp. 159 (WD Pa. 1955); *Florida Citrus Commission* v. *United States*, 144 F. Supp. 517 (ND Fla. 1956); *Electronic Industries Assn.* v. *United States*, 310 F. Supp. 1286 (DC 1970). In those cases in which shippers have attacked the ICC's decision that rate increases *in general* were justified, the courts, going beyond the *Algoma* decision, have declined review on the ground that the shipper had not exhausted his administrative

[16] The court declined to term its holding, in this regard, jurisdictional. It also said that it would review a claim that the ICC's order in a general revenue proceeding deprived a plaintiff of an "independent legal right." *Id.*, at 496. Moreover, the court did address on the merits the issue which the ICC *did* decide—namely whether the evidence supported the need for a *general* rate increase. The ICC claims that courts do have jurisdiction to review its decision in this respect notwithstanding the plaintiff's failure previously to seek relief under § 13. We do not decide whether the ICC is correct. See n. 18, *infra*.

remedies under §§ 13 and 15. *Atlantic City Electric Co.* v. *United States*, 316 F. Supp. 337 (DC 1969), both aff'd by an equally divided court, 400 U. S. 73 (1970).

B

The railroads claim that the decision of the court below violates the rule of the cases discussed above that decisions by the ICC in general revenue proceedings are unreviewable. First, the railroads argue that the decision in a general revenue proceeding not to *declare rates unlawful* is just as much an interim decision—since it does not finally decide the lawfulness of any particular rate—as is a decision not to *suspend* a particular rate pending investigation. See *Algoma Coal & Coke Co.* v. *United States, supra.* Therefore, review of that decision is squarely banned by the Court's holding in *United States* v. *SCRAP*, 412 U. S. 669, that the courts have no power to suspend, or to overturn the ICC's decision not to suspend, rates pending the ICC's final determination of their lawfulness. Second, treating the decision of the court below as though it were a substantive review of the ICC's order—addressed to the question whether the record supported the ICC's decision not to suspend the rates as to recyclables—the railroads contend that the court below reviewed an issue not yet decided finally by the ICC in violation of settled principles of finality and exhaustion of administrative remedies.[17] More generally, the railroads attack the conclusion of the District Court that the rule against review of general revenue proceedings does not apply in "NEPA cases" as being squarely

[17] The railroads contend that environmental groups may file complaints under § 13 challenging the justness and reasonableness of rates or groups of rates. The court below tentatively ruled otherwise. In light of our disposition of the issue dealt with in this part, we need not decide who is correct.

contrary to this Court's decision in *SCRAP I* that NEPA does not effect a change in pre-existing jurisdictional rules. We disagree with each of these arguments.

The railroads' first argument fails because the court below did not enjoin collection of the rates. The rule of *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U. S. 658 (1963), and *SCRAP I* is one barring courts from entering disruptive injunctions against collection of rates not finally declared lawful or lawful by the ICC. No such injunction is involved here. Thus even if a decision not to declare rates unlawful in a general revenue proceeding is no more final for purposes of the rule of *SCRAP I* than a decision not to suspend an individual rate pending investigation, the rule of *SCRAP I* is not applicable here.

The railroads' second argument fails because, unlike the issue of the reasonableness of a particular rate, and arguably unlike the issue of the reasonableness of a general increase,[18] the issue addressed by the court below had

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[18] The position of the ICC seems to be that its decision that a *general* rate increase is justified by reason of revenue need is a final decision ripe for immediate review and *Algoma Coal & Coke Co.* v. *United States*, *supra*, would seem to support it. The railroads claim that such a decision is unreviewable absent exhaustion of § 13 remedies and they are supported in this contention by the lower court decisions in *Atlantic City Electric Co.* v. *United States*, *supra*, and *Alabama Power Co.* v. *United States*, *supra*. We need not resolve this issue.

Part of NEPA provides that "the policies, regulations, public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter," 42 U. S. C. § 4332 (1); and one of the policies of the chapter is to "approach the maximum attainable recycling of depletable resources." The District Court expressly declined to review the question whether the ICC ultimately "gave insufficient weight to this environmental value" in reaching its conclusion that the general increase was justified. Therefore, this appeal does not involve reviewability of those substantive issues, including environmental issues, decided by the ICC at the general revenue proceeding.

opened *Ex parte 281* and into its decision in May 1973, as it would have been if the October 4, 1972, report had never been written; this it proceeded to do and we perceive no basis for affirming the District Court's decision in this respect.

V

Emphasizing again the nonfinal and limited nature of the decision made by the ICC at a general revenue proceeding, the railroads and the ICC argue that the District Court erred in concluding that the environmental impact statement itself was deficient. They claim that throughout the general revenue proceeding the Commission gave environmental issues the "hard look" which is required by NEPA, *Natural Resource Defense Council V. Morton*, — U. S. App. D. C. —, 458 F. 2d 827, 838 (1972), and that appellees and the court below simply disagreed with their decision not to prevent the increase on recyclables. They also emphasize the fact that they were giving continuing and more extensive attention to environmental consequences flowing from the rate structure in another proceeding, *Ex parte 270*, which was more appropriate to the task. We substantially agree with this position.

In order to decide what kind of an environmental impact statement need be prepared, it is necessary first to describe accurately the "federal action" being taken. The action taken here was a decision—entirely nonfinal with respect to particular rates—not to declare unlawful [21] a *percentage increase* which on its face applied

[21] The decision which the ICC makes in a general revenue proceeding is by law far more confined than, for example, that of an agency deciding whether and where to build a new prison. *E. g., Hanly* v. *Mitchell*, 460 F. 2d 640 (CA2 1972), cert. denied *sub nom. Hanly* v. *Kleindeinst*, 409 U. S. 990. The ICC is permitted to act against proposed rate increases, for more than a seven-month period, only if upon the basis of its investigation it can find that the

equally to virgin and some recyclable materials and which on its face limited the increase permitted on other recyclables. As in most general revenue proceedings, the "action" was taken in response to the railroads claim of a financial crisis; and the inquiry, true to our decision in *United States* v. *Louisiana, supra*, was primarily into the question whether such a crisis—usually thought to entitle the railroads to the general increase—existed, leaving *primarily* to more appropriate future proceedings the task of answering challenges to rates on individual commodities or categories thereof.[22] The point is that it is the latter question—usually involved in a general revenue proceeding only to a limited extent—which may raise the most serious environmental issues. The former question—the entitlement of the railroads to some kind of a general rate increase—raises few environmental issues and none which are claimed in this case to have been inadequately addressed in the impact statement.

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rates are unlawful, *i. e.*, unjust or unreasonable or otherwise in violation of the Act. The ICC has concluded, and we agree, that the standards of the Act are broad enough to permit consideration of environmental factors, even at general revenue proceedings, *Dayton-Goose Creek R. Co.* v. *United States*, 263 U. S. 456, 480 (1924); *Ex partes 265* and *267*, Increased Freight Rates, 1970 and 1971, 339 I. C. C. 125, 209 (1971). At the same time, standard ratemaking criteria limit the power of the ICC to force railroads to transport recyclable materials at deficit rates no matter how much the environment would be benefited thereby and no matter how much environmental injury would be caused by not doing so. Under present statutes, for example, the railroads could not be required to reduce rates on recyclables to zero.

[22] Appellants have not argued that consideration of the lawfulness of particular rates on particular recyclables was in no way before the ICC in *Ex parte 281*. We assume for the purposes of this case, therefore, that the "action" taken in *Ex parte 281* included a decision not to declare particular rates on recyclables unlawful on the basis of the very limited inquiry appropriate to a general revenue proceeding.

The appellees insist that the decision not to prevent the facially neutral increases itself involves an impact on the environment when superimposed on an underlying rate structure which discriminates against recyclables.[23] They claim that the underlying rate structure involved here does discriminate against recyclables with serious environmental consequences and that upon more extensive consideration of the issue, the ICC has in some part at least agreed with them and acted accordingly in subsequent general revenue proceedings.[24] Accordingly, it is said, the environmental consequences flowing from a facially neutral increase must be explored in an impact statement and can only be explored by analyzing the underlying rate structure. They further argue with force and some support in the record that the ICC has been tardy in complying with NEPA, that the ICC was required to anlayze the underlying rate structure only once with a view toward environmental consequences;[25] that it had plenty of time and cause to do so before *Ex parte 281;* and that it should, therefore, not have been permitted to terminate *Ex parte 281* without having done so. This argument, however, stumbles over the

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[23] A percentage increase increases a high rate a larger absolute amount than it does a low rate.

[24] The Commission has concluded a thorough investigation, in *Ex parte 270,* of the underlying rate structure as it applies to ferrous scrap and the virgin ores with which it competes. In *Ex parte 295,* a subsequent general revenue proceeding, the Commission concluded on further investigation that the rates on waste paper and nonferrous metal scrap are high in comparison to the virgin materials with which they compete, and it refused to permit increases as to them. It also concluded that the environmental consequences of this situation are small. In *Ex parte 310,* the most recent general revenue proceeding, the ICC declined to permit increases on either ferrous or nonferrous scrap, citing general economic factors which had hurt those industries in particular.

[25] See CEQ Guidelines, 40 CFR, § 1500.6 (d)(1).

holding in *United States* v. *Louisiana*, *supra*, which gives the ICC wide discretion in deciding what issues to address in a general revenue proceeding and permits it to postpone comprehensive consideration of claims of discrimination. It loses virtually all of its force in light of the fact that the ICC had begun an investigation of the underlying rate structure in *Ex parte 270* before commencing *Ex parte 281* and had started devoting specific attention to environmental issues in that proceeding before the decision of the court below. Thus even if NEPA—in the face of *United States* v. *Louisiana* and the failure of the appellees to initiate a proceeding under § 13 challenging rates on recyclables—were read to require the ICC to address comprehensively the underlying rate structure at least once before approval of a facially neutral general rate increase, no purpose could have been served by ordering it to thoroughly explore the question in the confined and inappropriate context of a railroad proposal for a general rate increase when it was already doing so in a more appropriate proceeding. The rate increases will remain effective in any event until such time as the ICC obtains sufficient information to declare the increase on some commodities unlawful.[26]

The decision of the lower court, therefore, to deem the "federal action" involved in *Ex parte 281* to include an implicit approval of the underlying rate structure was inaccurate and led it to an entirely unwarranted intrusion into an apparently sensible decision by the ICC to

[26] The Council on Environmental Quality on whose opposition to the impact statement appellees heavily rely, apparently recognizing the wisdom of exploring the underlying rate structure in a proceeding commenced expressly for that purpose acquiesced in consideration of these issues in the context of *Ex parte 270*, provided only that the increases on recyclables be suspended in the interim. CEQ overlooked, however, the fact that the Commission was wholly without power to do this.

take much more limited "action" in that proceeding and to undertake the larger action in a *separate* proceeding better suited to the task.[27]

Having defined the scope of the "federal action" being taken in *Ex parte 281*, decision of this case becomes easy. The lower court held that the environmental impact statement inadequately explored the underlying rate structure and inadequately explored the *extent* to which the use of recyclables will be affected by the rate structure. Whatever the result would have been if the ICC had been approving the entire rate structure in *Ex parte 281*,[28] given the nature of the action taken by the ICC, the lower court was plainly incorrect.

A review of the record discloses that environmental issues pervaded the proceeding. In terms of time, paper and effort on the part of the Commission, the railroads,

[27] Apparently recognizing that the ICC's terminating of *Ex parte 281* did not terminate its consideration of environmental issues relating to its rate structure and the consequent pointlessness of forcing the ICC to duplicate its efforts in the context of *Ex parte 281*, all of the appellees, except NARI have filed suggestions of mootness. The case is not moot. The situation is not substantially different than it was at the time of the lower court's decision; and the ICC is under an order to prepare a new impact statement in *Ex parte 281* and to hold hearings in *Ex parte 281* and to write a final report in *Ex parte 281* after the hearings. The ICC has not yet done so and claims that it should not be required to do so. NARI claims that it should be required to do so. We must decide who is right. However, we agree with the thrust of the suggestions of mootness that the relief granted below was not in the best interests of anyone.

[28] A large portion of the briefs in these cases is devoted to the question of the proper scope of review by a court of the adequacy of the treatment of environmental issues in an impact statement. Compare *e. g.*, *Lathan* v. *Brinegar*, — F. 2d — (CA9), with *City of New York* v. *United States*, 344 F. Supp. 929 (EDNY 1972). However, we need not resolve this question since, in light of the "action" taken, under any standard of review the ICC gave an adequately "hard look" at environmental matters.

other government agencies, and the appellees, the environmental issues far outweighed the financial issue usually thought controlling at a general revenue proceeding. The various statements, formal and informal, expressly recognized what all agree are the important possible environmental consequences involved—increased solid waste disposal and accelerated depletion of natural resources. The statements implicitly recognized the common sense proposition that decisions to increase rates on recyclables could deter their use. The reports explored at some length the degree to which rate changes would affect the use of several separate categories of recyclables, looking, *inter alia*, at past responses to rate changes and at various other factors affecting use of recyclables including technological aspects of the different recycling industries. Finally, the statements inquired, preliminarily, into the fairness of the underlying rate structure, concluding that on the basis of th information then available no discrimination could be found. Assuming that some rudimentary examination into the underlying rate structure and into the reasonableness of the new rates on particular recyclables was required, the consideration of environmental factors in connection therewith was more than adequate. Appellees' best argument is that the ICC has acquired more knowledge, since *Ex parte 281*, and has changed its mind on a number of matters and acted accordingly. This, however, simply points up the limited nature of the decision made in *Ex parte 281* and the absence of a need to reopen it.

Reversed.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

Nos. 73–1966 AND 73–1971

Aberdeen and Rockfish Railroad Company et al., Appellants,
73–1966 *v.*
Students Challenging Regulatory Agency Procedures (S. C. R. A. P.) et al.

United States et al., Appellants,
73–1971 *v.*
Students Challenging Regulatory Agency Procedures (S. C. R. A. P.) et al.

On Appeal from the United States District Court for the District of Columbia.

[June 24, 1975]

MR. JUSTICE DOUGLAS, dissenting in part.

I agree with Parts I, II, and III of the Court's opinion, that the case is properly here and that the District Court had jurisdiction over appellees' complaint. On the merits, I would, however, affirm.

This litigation presents a history of foot-dragging by the ICC, as other parties to proceedings before it, including other federal agencies, have attempted to prod it into compliance with the National Environmental Policy Act (NEPA). The "final impact statement" that the Court holds adequate presents a melange of statistics that purport to show that an increase on the transportation rates of recyclable materials will not have a significant adverse impact on the environment. The Commission's "analysis" has been thoroughly discredited

by the comments of other federal agencies, including not only the Environmental Protection Agency and the Council on Environmental Quality, whose principal concerns are environmental, but also the Department of Commerce and the General Services Administration. The Commission has responded to the adverse comments by papering over the defects they identify, rather than dealing with the substance of the deficiencies.

The environmental effects at stake are described in my opinion when the case was here before. *United States* v. *SCRAP*, 412 U. S. 669, 699–714. Appellees oppose increases on the rates for recyclables because increases in transportation cost will retard the use of recycled products and thereby contribute to further depletion of our natural resources. The Commission responded initially by asserting that an increase in transportation charges would have *no* effect upon the demand for scrap materials, and cited in support of this proposition statistics showing that during a multiyear period when freight rates were rising, prices of recyclables fluctuated widely and consumption generally increased. See 341 I. C. C. 288, 397–402. The fallacy of the Commission's argument was exposed by the Council on Environmental Quality, commenting on the price of and demand for ferrous metal scrap:

> "... Scrap prices are determined by a number of factors operating simultaneously, among them are the aggregate demand for steel, the price and transportation costs of iron ore, the supply of scrap, as well as the transportation cost of scrap and other factors. It would be surprising indeed if, in light of the number of factors at work in the scrap market, a close and simple relationship existed between scrap price movements and freight rate changes.
>
> "Nor does data which shows a constantly grow-

> ing consumption of scrap despite rate increases prove that freight rate decisions are inconsequential. Growth might have been materially higher or lower had rate decisions been different. What is needed in each instance is a multivariate analysis to isolate the effect of transportation costs on scrap prices and the quantity consumed." [1]

Yet the Commission persisted in these assertions, and it failed to make the price sensitivity studies the Council recommended. See *Ex parte 281, Increased Freight Rates and Charges*, 346 I. C. C. 88, 145–149 (1973).

Appellees also argued to the Commission that the rate increases for recyclables exacerbated an existing discrimination against these materials in the rate structure. The Commission expressed doubt that any unjustified discrimination existed, arguing that any disparity was probably attributable to differing costs. But a Department of Transportation Study cited in the presentation made by the Environmental Protection Agency had concluded that ratios of revenue to cost were higher for certain recyclable commodities than for their virgin substitutes, causing the former to bear more than their "share" of the cost of service. The Commission's own statistics supported this conclusion to some extent. Comparing the revenue-cost ratios for ferrous scrap and for iron ore, the Commission found that the scrap bore the lesser share of variable costs but a greater share of all costs—fixed and variable—than did ore. 346 I. C. C., at 124. The Commission did not inquire further into this disparity.

The Court implicitly concedes the shortcomings of the Commission's analysis, relying, as the Commission did,

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[1] Letter from Russell E. Train, Chairman of Council on Environmental Quality, to ICC, October 30, 1972. (App. 572.)

already been finally decided by the Commission and the relief sought from and granted by the court below could not have been obtained from the ICC in a subsequent § 13 proceeding. The issue decided by the District Court was whether under NEPA the ICC had given adequate consideration to environmental factors in the general revenue proceeding. When the ICC terminated the general revenue proceeding, the one thing which it must certainly have finally decided was that it need give no further *consideration* to environmental factors *in that proceeding;* and no relief of the type sought from the District Court—*i. e.*, further consideration of environmental matters by the agency in that proceeding—could thereafter be obtained from the agency. Whatever issues would remain open at a § 13 proceeding, one which would not remain open—no matter who filed the complaint—is whether or not sufficient consideration had been given to environmental factors at the general revenue proceeding. Of course, the ICC would give attention in the § 13 proceeding to whatever environmental factors it felt NEPA required at *that* proceeding.

Although the railroads claim that a general revenue proceeding is an interim proceeding—the final one being a § 13 proceeding at which particular rates are adjudicated just and reasonable—for ratemaking purposes, they do not claim that it has a similar status for NEPA purposes. All parties now agree that a general revenue proceeding is itself a "major federal action," independent from any later adjudication of the reasonableness of particular rates, requiring its own final environmental impact statement so long as the proceeding has a substantial effect on the environment. This conclusion is clearly correct. Thus whatever consideration of environmental matters is necessary or proper at the general revenue proceeding is over and done with when that pro-

ceeding terminates. The interim nature of a general revenue proceeding may be relevant to the question of the extent of the consideration of environmental facts required, but its nature does not prevent review of the question, finally decided by the ICC, whether the environmental impact statement prepared for that proceeding, is adequate.

Our holding here is in no way inconsistent with our conclusion in *SCRAP I* that NEPA does not repeal by implication any other statute. We do not hold that NEPA supplies the courts with otherwise nonexistent power to prevent collection of rates; and we do not hold that NEPA permits review of the question of the justness or reasonableness of rate increases, either general or specific, at any earlier time than would otherwise have been permissible. NEPA does create a discreet procedural obligation on government agencies to give written consideration of environmental issues in connection with certain major federal actions and a right of action in adversely affected parties to enforce that obligation. When agency or departmental consideration of environmental factors in connection with that "federal action" is complete, notions of finality and exhaustion do not stand in the way of judicial review of the adequacy of such consideration, even though other aspects of the rate increase are not ripe for review.

IV

We agree with appellants that the District Court erred in deciding that the oral hearing which the ICC chose to hold prior to its October 4, 1972, order was an "existing agency review process" during which a final draft environmental impact statement (*i. e.*, the one circulated in March, 1973) should have been available and that it also erred in deciding that the ICC should have "started

over again" after it decided to prepare a formal impact statement.

NEPA provides that "such statement . . . shall accompany *the proposal* through the existing agency review processes" (emphasis added). This sentence does not, contrary to the District Court opinion, affect the time when the "statement" must be prepared. It simply says what must be done with the "statement" once it is prepared—it must accompany the "proposal." The "statement" referred to is the one required to be included "in every recommendation or report on proposals for . . . major federal actions significantly affecting the quality of the human environment" and is apparently the final impact statement, for no other kind of statement is mentioned in the statute. Under *this* sentence of the statute, the time at which the agency must prepare the final "statement" is the time at which it makes a recommendation or report on a *proposal* for federal action. Where an agency initiates federal action by publishing a proposal and then holding hearings on the proposal, the statute would appear to require an impact statement to be included in the proposal and to be considered at the hearing. Here, however, until the October 4, 1972 report, the ICC had made no proposal, recommendation or report. The only proposal was the proposed new rates filed by the railroads.[19] Thus, the earliest time at which the *statute* required a statement was the time of the ICC's report of October 4, 1972—sometime after the oral hearing.[20]

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[19] The ICC did require the railroads to circulate a draft impact statement shortly after its proposal was made.

[20] To the extent to which *Calvert Cliffs' Coordinating Committee* v. *Atomic Energy Comm'n*, 146 U. S. App. D. C. 33, 449 F. 2d 1109 (1971), *Greene County Planning Bd.* v. *Federal Power Comm'n*, 445 F. 2d 412 (CA2), cert denied, 409 U. S. 849 (1972), and *Harlem Valley Transportation Assn.* v. *Stafford*, 500 F. 2d 328 (CA2 1974), read the requirement that the state-

The statute also requires that agencies consult with other environmentally expert agencies "prior to making any detailed statement"; and CEQ guidelines provide that:

> "To the fullest extent possible, all . . . hearings [on proposed agency action] shall include consideration of the environmental aspects of the proposed action. . . . Agencies should make *any* draft environmental [impact] statements to be issued available to the public at least fifteen (15) days prior to the time of such hearings." 40 CFR § 1500.7 (d). (Emphasis added.)

Such consultation occurred here from the outset; environmental issues pervaded the hearings held—both oral and written; and all draft impact statements in existence were circulated before the hearings. *Procedurally,* NEPA was thus thoroughly complied with through October 4, 1972.

Assuming that the ICC erred in failing to prepare a separate formal environmental impact statement to accompany its October 4, 1972 report or that the consideration given to environmental factors in that report was inadequate, the ICC need *not* have "started over again." To the extent that the District Court's conclusion to the contrary is based on its belief that the draft statement of March 1972, had to be considered at a hearing, it is incorrect for the reasons stated above. To the extent that it is based on the District Court's belief that the ICC did not in good faith reconsider its October 4, 1972, order in light of the impact statement, the District Court's decision is without support in the record. The ICC was in as good a position to correct a statutory error by integrating environmental factors into its re-

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ment accompany the proposal through the existing agency review processes differently, they would appear to conflict with the statute.

on the prospect that the environmental issues would receive further study in *Ex parte 270*, a proceeding initiated to investigate the entire freight rate structure. But NEPA commands an agency to consider environmental effects before it takes a "major federal action," not to relegate consideration to further proceedings after action is taken, particularly where there is no assurance that a prompt conclusion will be forthcoming. When the Commission terminated its proceedings in *Ex parte 281*, *Ex parte 270*, had been in progress for more than two years. The scope of the investigation had not been fully defined at that time, and the prospect of any prompt illumination of the environmental issues was certainly remote. The Commission took no particular steps to expedite completion of that phase of the investigation that would embrace the environmental issues controverted in *Ex parte 281*. Instead, the Commission was content to put aside these issues, offering a vague assurance that they would be taken up again in the course of what promised to be a protracted proceeding. Today, nearly two years later, we are not apprised of any conclusions as to environmental issues reached as a result of *Ex parte 270;* we do not even know whether a completion date is in sight. Meanwhile, environmental damage—*irreversible* damage—which appellees alleged with considerable supporting evidence may be continuing, with its magnitude unknown.

NEPA is more than a technical statute of administrative procedure. It is a commitment to the preservation of our natural environment. The statute's language conveys the urgency of that task. The District Court acted responsibly when it refused to accept the Commission's representations that a complete treatment of the environmental issues was beyond its capability and therefore should not be required. One purpose of

NEPA was to force agencies to *acquire* expertise in environmental matters, even if attention to parochial matters in the past had not demanded this capability.[2] The Court today excuses the Commission's performance. The District Court, following the spirit of NEPA, told the Commission to do better. I would affirm its judgment.

[2] Section 102 (2) (A) requires all agencies to

"utilize a systematic, *interdisciplinary* approach which will *insure* the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment." (Emphasis added.)